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AUTHOR	Hager, Ronald M.
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ABSTRACT

This booklet discusses using the Individuals with Disabilities Education Act (IDEA) and Section 504 of the Rehabilitation Act of 1973 as funding sources or enforcement tools to ensure that children with disabilities receive needed assistive technology (AT) services and devices. The first section is devoted to a detailed analysis of the legal framework of IDEA. Provisions relating to least restrictive environment, the Individualized Education Program, private school placements, due process protections, and discipline are discussed. This section is followed by a similarly comprehensive analysis of how IDEA can be used as a tool for obtaining AT, including basic eligibility criteria, evaluations, home use of AT, private insurance and Medicaid, and repairs and damages. Key court decisions and their implications are reviewed. Some of the major issues involving maximization of a student's potential and uses of educational methodology are then discussed. The booklet also reviews obligations of school districts under Section 504, including legal responsibilities relating to least restrictive environment, due process and procedural safeguards, and AT. The final section of the booklet discusses remedies available when parents disagree with a decision made by the school and the remedies available when attorneys or advocates seek to address more systemic problems. (CR)

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FUNDING OF ASSISTIVE TECHNOLOGY

The Public School's Special Education System as a Funding Source: The Cutting Edge

Assistive Technology Funding & Systems Change Project
United Cerebral Palsy Associations
Washington, D.C.

National Assistive Technology Advocacy Project
A Project of Neighborhood Legal Services, Inc.
Buffalo, New York

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June 1999

Assistive Technology Funding & Systems Change Project
United Cerebral Palsy Associations
Suite 700, 1660 L Street, N.W.
Washington, D.C. 20036
(V) 1-800-872-5827; (fax) 202-776-0414
(email) atproject@ucpa.org

National Assistive Technology Advocacy Project
A Project of Neighborhood Legal Services, Inc.
Buffalo, New York

Individual Author:

Ronald M. Hager, Esq.
National Assistive Technology Advocacy Project
Neighborhood Legal Services, Inc.
295 Main Street, Room 495
Buffalo, New York 14203
(v) 716-847-0650; (fax) 716-847-0227
(tdd) 716-847-1322
(email) rhager@nls.org
(web page) www.nls.org

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A LISTING OF ACRONYMS AND ABBREVIATIONS

AT:	Assistive technology
EHLR:	Education for the Handicapped Law Reports
FAPE:	Free appropriate public education
IDEA:	Individuals with Disabilities Education Act
IDEA '97:	The 1997 amendments to the Individuals with Disabilities Education Act
IDELR:	Individuals with Disabilities Education Law Reports (formerly EHLR)
IEP:	Individualized education program
IEP Team:	The group of people, including the parent(s), responsible for developing the IEP
LRE:	Least restrictive environment
OSEP:	The U.S. Department of Education's Office of Special Education Programs
VR:	Vocational rehabilitation

I. INTRODUCTION

Assistive technology (AT) offers children with disabilities the ability to meet their full potential. Specialized computer keyboards, screen magnification systems and specially-designed software offer children with physical, visual or cognitive impairments the adaptations they need to allow them to benefit from 1990s technology that we take for granted. Similarly, items like augmentative communication devices and FM systems offer students with speech or hearing impairments the ability to fully participate in the educational experience. Other AT devices, and the training needed to understand their use, will help prepare students as they transition from special education programs to adult activities.

Most of the AT that is available today did not even exist when the federal special education mandates first took effect in the late 1970s. In fact, many of the AT devices that are available to children today were not available when the United States Supreme Court issued its landmark decision in the *Rowley* case in 1982.

How will school districts, state educational agencies, the United States Department of Education and the courts interpret the mandates of the Individuals with Disabilities Act (IDEA), 20 U.S.C. §§ 1400, *et seq.*, in light of what AT now offers to students with disabilities? Have these answers now changed under the 1997 amendments to IDEA and the Department of Education's regulations which were issued on March 12, 1999? Is the *Rowley* decision still good law and how does it apply in the AT context? Are there special mandates, under section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, that apply when a school-aged student needs AT?

These and other issues which arise in the context of using AT to benefit a student with a disability in the public school setting are clearly "at the cutting edge" of the law. As explained below, many of these issues are addressed, at least in part, in the 1997 amendments to IDEA and the 1999 regulations. They are also addressed in United States Department of Education policy letters that have been issued over the past 10 years.

The focus of this booklet is on IDEA and section 504 as funding sources or enforcement tools to ensure that children with disabilities get needed AT. Our intent is to provide the reader with a working knowledge of the relevant laws, regulations and interpretations of them as they relate to a school's obligation. Armed with this knowledge, attorneys and advocates who specialize in special education law should be well-prepared to advocate for AT.

Since IDEA is a very comprehensive statute, the first section of this booklet is devoted to a detailed analysis of its legal framework. That is followed by a similarly comprehensive analysis of how IDEA can be used as a tool for obtaining AT. We then go through some of the major, "cutting edge" issues involving maximization of a student's potential and uses of educational methodology. We will follow a similar approach with section 504. Finally, we go through remedies available when parents disagree with a decision made by the school and the remedies available when attorneys or advocates seek to address more systemic problems.

II. OVERVIEW OF THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT

Historically known as Public Law 94-142, IDEA was initially passed in 1975 and was effective on September 1, 1978. We have, therefore, celebrated the 20th anniversary of its implementation during the 1998-99 school year. Although the statute has been amended several times during this period, the basic provisions have remained the same. Nevertheless, there are still significant problems with compliance.

IDEA is a sweeping statute. States are given federal money to help meet the costs of educating students with disabilities. In turn, they must agree to comply with the terms of the law. This booklet will provide a detailed analysis of the basic provisions of IDEA before going into the standards for obtaining AT. It will then look at specialty problem areas which also effect the availability of AT for the student.

On June 4, 1997, President Clinton signed into law a significant amendment to IDEA (IDEA '97). The law, which passed both houses of Congress with near unanimous support, followed several years of debate. Several proposals which emerged during this period suggested significant limits on the rights of children. However, the final product, on balance, enhanced the services available to children with disabilities, strengthened the role of parents and increased the reliance on AT to ensure that students receive an appropriate education.

The tenor of the changes is best captured by the Congressional finding that education of children with disabilities can be made more effective by: (1) having high expectations and ensuring access to the general curriculum to the maximum extent possible; (2) strengthening the role of parents and ensuring that families "have meaningful opportunities to participate in the education of their children"; (3) coordinating IDEA requirements with other school improvement efforts to ensure that students benefit from those efforts and that special education becomes a service for children rather than a place where they are sent; (4) "providing appropriate special education and related services and aids and supports in the regular classroom" whenever appropriate; (5) "supporting high-quality, intensive professional development for all personnel working" with children; (6) "providing incentives for whole-school approaches and pre-referral interventions to reduce the need to label children" to obtain services; and (7) "focusing resources on teaching and learning while reducing paperwork and requirements that do not assist in improving educational results." 20 U.S.C. § 1400(c)(5)(emphasis added).

On March 12, 1999, the final federal regulations implementing IDEA '97 were issued. Federal Register, pp. 12406, *et seq.*, 3/12/99. As with IDEA '97, which required that IEP Teams consider the potential need for AT for all students with disabilities, the new regulations add provisions governing the availability of AT to meet students' needs. The effective date of the regulations is May 11, 1999, but compliance is not required until the receipt of fiscal 1999 money, or by October 1, 1999, whichever is earlier. *Id.*, p. 12406. The regulations incorporate changes made by IDEA '97, as well as longstanding interpretations of IDEA by the U.S. Department of Education's Office of Special Education Programs (OSEP). *Id.* As all of the requirements of IDEA '97 are currently in

effect, any of the regulations which merely restate IDEA '97 must be implemented immediately. *Id.*, p. 12407.

A. Free Appropriate Public Education

1. General Standards

Part B of IDEA guarantees that all students with disabilities aged 3 through 21 have the right to a "free appropriate public education" (FAPE). 20 U.S.C. §§ 1401(8), 1412(a)(1)(B) and 1419(b)(2). [Part C, which this article will not discuss, covers children with disabilities from birth through age two.] But, the statute now allows a State to exclude from the requirements of IDEA individuals between the ages of 18 and 21 who are incarcerated in adult correctional facilities and who had not been classified or had an individualized education program (IEP) in the last educational placement prior to being incarcerated. 20 U.S.C. § 1412(a)(1)(B)(ii).

The right to a FAPE also ends when a student graduates with a regular high school diploma. 34 C.F.R. § 300.122(a)(3)(i). This does not include students who have received a certificate of attendance or a certificate of graduation that is not a regular high school diploma. *Id.* § 300.122(a)(3)(ii). However, graduation is considered a change of placement, requiring notice and the right to an impartial hearing. *Id.* § 300.122(a)(3)(iii). It does not require a reevaluation. *Id.* § 300.534(c)(2).

All services provided under IDEA must be at no cost to the parents or student. 20 U.S.C. § 1401(8)(A). To be eligible, the student must meet the definition of one of several enumerated disabilities and, "by reason thereof," need special education and related services.[1] 20 U.S.C. § 1401(3).

Pursuant to what is referred to as the "child find" requirement, schools must identify, locate and evaluate all children with disabilities within their jurisdiction, including those attending private schools. *Id.* § 1412(a)(3)(A). The new regulations specifically mention that this requirement applies to highly mobile children such as migrant and homeless students and to students suspected of having a disability who are advancing from grade to grade. 34 C.F.R. § 300.125(a)(2).

IDEA also includes a concept referred to as "zero reject" - all children are entitled to a FAPE "regardless of the severity of their disabilities." 20 U.S.C. § 1412(a)(3)(A); *Timothy W. v. Rochester, N.H., School Dist.*, 875 F.2d 954 (1st Cir. 1989), *cert. denied*, 493 U.S. 983 (1989).

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[1]This booklet will not discuss the eligibility criteria, and will assume the student is already eligible. However, the new regulations add attention deficit disorder as an example of a covered condition under the definition of other health impaired and allow a child to be classified as autistic even if the characteristics of autism are manifested after age three. 34 C.F.R. § 300.7(c)(1)(ii) and (9).

2. The Supreme Court's Decision in *Rowley*

When Congress enacted IDEA, it did not use an objective measure to determine whether a student was receiving an appropriate education. In other words, Congress did not say that all children with disabilities have the right to services in a special education class or all students have the right to AT or all students will make one year of progress each school year. Because every child's needs are different, these measures are not helpful. Instead, Congress used a very general and subjective term, "appropriate." In *Board of Ed. of the Hendrick Hudson Sch. Dist. v. Rowley*, 458 U.S. 176 (1982), the United States Supreme Court set forth the standard for determining whether a student was receiving the appropriate education required by IDEA.

The parents of Amy Rowley, a deaf student with minimal residual hearing and excellent lip reading skills, sought the services of a full-time interpreter in her regular classes. Amy had been provided with an FM trainer, a teacher of the deaf for one hour per day and speech for three hours per week. Even though Amy was missing about half of what was being discussed in class, she was very well adjusted, was performing better than the average child in the class and was "advancing easily from grade to grade." *Id.* at 184-185.

Based on these facts, the Supreme Court determined that Amy was receiving an "appropriate" education without the sign interpreter. In reaching this opinion, the Court concluded that the obligation to provide an appropriate education does not mean a school must provide the "best" education or one designed to maximize a student's potential. *Id.* at 199.

However, the program must be based on the student's unique individual needs and be designed to enable the student to benefit from an education. In other words, the student must be making progress. *Id.* at 188, 189. More than a minimal benefit is required for the program to be appropriate. The IEP must confer "meaningful benefit," which means that it must provide for "significant learning." In determining how much benefit is enough, the student's intellectual potential must be considered. *Polk v. Central Susquehanna Intermediate Unit*, 853 F.2d 171 (3rd Cir. 1988), *cert. denied*, 488 U.S. 1030 (1989); *See Ridgewood Board of Ed. v. N.E.*, 30 Individuals with Disabilities Law Report (IDELR) 41 (3rd Cir. 1999). In the case of a student being educated in regular classes, the Supreme Court determined that in most cases, if the student was advancing from grade to grade with the benefit of supportive services, the student was receiving an appropriate education. *Rowley* at 203.

Noting the importance of the procedural safeguards for developing a student's program, the Court developed a two-part test to determine if the program was appropriate. The test comes down to these questions: First, did the school comply with IDEA's procedures? Second, was the IEP reasonably calculated to enable the child to benefit from his or her educational program? In answering this second question, the Supreme Court cautioned that lower courts should not substitute their view of appropriate educational methodology for that of the educational experts. The Court ruled that once a lower court "determines that the requirements of [IDEA] have been met, questions of methodology are for resolution by the States." *Id.* at 206-208.

Not surprisingly, these standards on maximization of potential and educational methodology set by the Supreme Court have been the subject of an incredible amount of litigation. They also go to the heart of determining the availability of AT. A separate section of this booklet will more fully analyze their impact on obtaining AT from the school system.

B. Least Restrictive Environment

IDEA requires that all students receive their educational services in the least restrictive environment (LRE). 20 U.S.C. § 1412(a)(5). Removal from regular education classes is to occur only when the student cannot be successfully educated in that setting even with supplemental aids and services. 34 C.F.R. § 300.550(b)(2).

However, in determining the LRE for a student, the program must still be appropriate to meet the student's individual needs. 34 C.F.R. § 300.550(b)(1). Accordingly, schools must have available a continuum of alternative placements, ranging from services in regular classes to separate classes, separate schools and even residential programs. *Id.* § 300.551. Moreover, in determining the student's actual placement, it should be as close as possible to the child's home and, unless the IEP calls for some other arrangement, the child should attend the school he or she would attend if not disabled. *Id.* § 300.552(c). As will be noted below, the provision of AT is intended to redefine the availability of placements in the LRE.

IDEA '97 strengthened the LRE mandate. Prior to this, although the language in the statute had remained unchanged, several courts interpreted the LRE provisions to open the door for increased inclusion of students with more severe disabilities in the regular education classroom than ever before.

1. Judicial Standard for LRE

Daniel R.R. v. State Board of Education, 874 F.2d 1036 (5th Cir. 1989), is one of the leading cases opening the door to increased inclusion of children with disabilities in regular education classes. The court noted that Congress created a strong preference in favor of "mainstreaming," i.e., educating the student in the regular education classroom with supports. Ironically, the court determined that it was not appropriate to include the child in that case in full time regular education. However, the court's analysis of the LRE requirement, especially its interpretation of what is meant by providing supplementary aids and services in the regular classroom, has been followed by a number of other courts.

In determining whether it is appropriate to place a student with disabilities in regular education, the student need not be expected to learn at the same rate as the other students in the class. In other words, part of the required supplementary aids and services must be the modification of the regular educational curriculum for the student, when needed. The court in *Daniel R.R.* noted, however, that the school need not modify the program "beyond recognition." Also, in looking at whether it is "appropriate" for the child to be in regular education, in other words, whether the

student can benefit educationally from regular class placement, the school must consider the broader educational benefit of contact with nondisabled students, such as opportunities for modeling appropriate behavior and socialization.

A school may consider the demands on the regular classroom, such as discipline problems the student may have or the extent of time the regular education teacher may need to spend with the student. However, the court stressed that the supplementary services a student may need to be successful in a regular education placement can include the assignment of an aide to minimize these concerns. Finally, the court emphasized that if full time placement in regular education cannot be achieved satisfactorily, the school must ensure that the child is educated with nondisabled students to the maximum extent appropriate during the school day.

In *Oberti v. Board of Educ.*, 995 F.2d 1204 (3rd Cir. 1993), the court applied the test established in *Daniel R.R.* and determined that the school did not comply with the LRE mandate. It noted that even though the student had significant behavioral difficulties the last time he was placed in the regular education environment, these difficulties were exacerbated by the inadequate level of services provided while he was placed in that environment. The court found that he could be successfully educated in the regular education environment with supplementary aids and services such as:

> [T]he assistance of an itinerant instructor with special education training, special education training for the regular teacher, modification of some of the academic curriculum to accommodate [the student's] disabilities, parallel instruction to allow him to learn at his academic level, and use of a resource room. *Id.* at 1222.

The court, in *Sacramento City School Dist. v. Rachel H.*, 14 F.3d 1398 (9th Cir. 1994), *cert. denied*, 512 U.S. 1207 (1994), determined that the appropriate placement for a child with an IQ of 44 was full-time regular education with some supplementary aids and services. The court found that the academic and non-academic benefits weighed in favor of placing the student in full-time regular education classes. The court noted that "all of her IEP goals could be implemented in a regular education classroom with some modification to the curriculum and with the assistance of a part time aide." *Id.* at 1401.

2. New LRE Requirements Mandated by IDEA '97

IDEA '97 fosters increased efforts to educate students with disabilities in the LRE. For example, as noted below, the IEP Team is to consider whether and how the child can participate in the general curriculum,[2] and the IEP is to indicate the extent to which the student will not be with nondisabled peers. 20 U.S.C. § 1414(d)(1)(A)(i) - (iv). Prior to IDEA '97, the IEP was to indicate the opposite – the extent the student would be educated with nondisabled peers.

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[2]The new regulations define the "general curriculum" as the "same curriculum as for nondisabled children." 34 C.F.R. §300.347(a)(1)(i).

The new regulations emphasize that students with disabilities cannot be removed from age-appropriate regular classrooms "solely because of needed modifications in the general curriculum." 34 C.F.R. § 300.552(e). Additionally, a student cannot be required to demonstrate a specific level of performance before being considered for regular class placement. However, the strong preference for placement in regular education does not mean that a student must fail in the regular education environment before a more restrictive setting may be considered. 34 C.F.R. Part 300, Appendix (App.) A, Question (Quest.) 1. Placement decisions must be based on the needs of the student and not on such factors as the classification of the student, availability of services, "configuration of the service delivery system, availability of space, or administrative convenience." *Id.*

States with a funding system that distributes money based on the type of setting a student is in must ensure that the funding system does not result in placements which violate the LRE requirement. In other words, states cannot use funding reimbursement systems to reward more restrictive placements. States with no such policies must assure the Secretary of Education that they will revise their funding mechanism as soon as feasible. 20 U.S.C. § 1412(a)(5)(B).

The law also reduces the reliance on labeling when placing students in the special education system. IDEA still requires that a student meet one of several listed conditions and, by reason thereof, require special education services. *Id.* §1401(3)(A). However, IDEA '97 gives states some options to reduce the use of labels when identifying students who are eligible for services.

First, for students aged three through nine, an additional, more broad-based category is available. Students with "developmental delays" in physical, cognitive, communication, social/emotional or adaptive development who need special education are also eligible for services. 20 U.S.C. § 1401(3)(B). (This definition had applied to children aged three through five.) If a state adopts the definition of developmental delay, it cannot force a school to use that term. 34 C.F.R. § 300.313(a)(2). Second, states are now allowed to provide services to students with disabilities without labeling them at all, as long as all eligible students receive the services to which they are entitled. 20 U.S.C. § 1412(a)(3)(B).

The statute also, for the first time, has a definition for "supplementary aids and services." These services include aids, services and other supports, and are to be made available in regular education classes and "other education-related settings" to enable children with disabilities to be educated with their nondisabled peers to the maximum extent appropriate. *Id.* § 1401(29). It clarifies that these supports are to be provided in other settings, in addition to the classroom, such as extracurricular settings. *See* 34 C.F.R. § 300.306. As discussed below, AT devices and services are included in this definition. Therefore, it is now even clearer that a student who needs an augmentative communication device, for example, should be able to use that device in after-school and other non-academic functions.

Based on the court cases discussed above, and other factors, an increasing number of children with more severe disabilities are being educated in regular classes. Regular education teachers have raised concerns that they do not have the training or support to meet the needs of these students.

Parents are often concerned because much of the discussion at IEP Team meetings about the services and supports that are needed to make the program successful do not end up on the IEP. IDEA '97 attempts to remedy this situation, at least to some degree.

The IEP Team must now include at least one regular education teacher of the child, if the child is or may be participating in "the regular education environment." 20 U.S.C. § 1414(d)(1)(B). The purpose of the regular teacher's involvement in the IEP process is, at least in part, to help determine behavioral strategies, supplemental aids and services, program modifications and supports for school personnel. *Id.* § 1414(d)(3)(C).

As noted below, any supplemental aids and services, program modifications and supports for the school personnel must be listed on the IEP. *Id.* § 1414(d)(1)(A)(iii). Prior to this amendment, many parents were told that the IEP was designed to set forth the services and goals for the student and there was simply no spot on the IEP nor any obligation to include services to be provided to the teachers. Many times, because agreed to supports such as in-service training for the teaching staff were not on the IEP, there were problems with implementation.

Because the IEP was silent, parents were also left with fewer legal safeguards. There is a remedy under IDEA for the failure to provide a service that is listed in the IEP. *See* 34 C.F.R. § 300.350(c). As will be discussed later, the regulations implementing section 504 also provide rights to students with disabilities in the school setting. Based on the definition of disability under section 504, any student classified under IDEA is also protected by section 504. The U.S. Education Department's Office for Civil Rights enforces section 504. It has held that the failure to implement the services agreed to in an IEP under IDEA is also a violation of section 504, which it will enforce. *See OSEP Policy Letter to Anonymous*, 18 IDELR 1037 (4/6/92).[3] However, if the supports are not included in the IEP, none of these protections will readily apply.

C. The Written Individualized Education Program

The written individualized education program (IEP) is the focal point of IDEA. In *Rowley*, the United States Supreme Court noted the importance of parental participation and compliance with proper procedures in developing a child's IEP. It stated:

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[3]IDEA '97 limits the use of opinion letters from the U.S. Department of Education. Policy letters cannot be used to establish rules for compliance. 20 U.S.C. § 1406. Nevertheless, the policy letters, as an official interpretation of the Department of Education, should carry considerable weight as to the proper interpretation of IDEA. Courts and others charged with enforcing the law must give considerable deference to an agency's interpretation of a statute that it administers, and may "not substitute its own reading unless the agency's interpretation is unreasonable." *Skandalis v. Rowe*, 14 F.3d 173, 178 (2d Cir. 1994)(citing *Chemical Mfrs. Ass'n v. Natural Resources Defense Council, Inc.*, 470 U.S. 116, 125 (1985); *Chevron U.S.A., Inc. v. National Resources Defense Council, Inc.* 467 U.S. 837, 844 (1984)). Accordingly, this article will regularly refer to opinions from the U.S. Department of Education.

> It seems to us no exaggeration to say that Congress placed every bit as much emphasis upon compliance with procedures giving parents and guardians a large measure of participation at every stage of the administrative process ... as it did upon the measurement of the resulting IEP against a substantive standard. We think that the Congressional emphasis upon full participation of concerned parties throughout the development of the IEP ... demonstrates the legislative conviction that adequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP. 458 U.S. 176, 204.

In another decision, the Supreme Court called the IEP the "centerpiece of the [IDEA's] education delivery system." *Honig v. Doe*, 484 U.S. 305, 311 (1988). It is obvious that the process of developing the IEP and the resulting document itself are more than mere technicalities. The Supreme Court quotes underscore the role that Congress envisioned for the IEP.

1. Parental Participation in IEP Development

From the beginning, IDEA has given the parents a critical role in the IEP process. Schools must ensure that the parents are present or are afforded the opportunity to participate, including: (1) "notifying parents early enough to ensure that they will have an opportunity to attend"; (2) "scheduling the meeting at a mutually agreed on time and place"; and (3) indicating "the purpose, time, and location of the meeting and who will be in attendance." 34 C.F.R. § 300.345(a) and (b)(emphasis added). The regulations allow a school to proceed with an IEP Team meeting without the parents in attendance only in the following circumstance:

> A meeting may be conducted without a parent in attendance if the [school] is unable to convince the parents that they should attend. In this case the [school] must have a record of its attempts to arrange a mutually agreed on time and place such as–
>
> (1) Detailed records of telephone calls made or attempted and the results of those calls;
>
> (2) Copies of correspondence sent to the parents and any responses received; and
>
> (3) Detailed records of visits made to the parent's home or place of employment and the results of those visits. *Id.* § 300.345(d)(emphasis added).

The school may ensure parental participation by using individual or conference telephone calls. *Id.* § 300.345(c). At the meeting, the school must take whatever action is necessary to ensure that the parents understand the proceedings, including arranging for an interpreter for parents with deafness or whose native language is other than English. *Id.* § 300.345(e).

When the IDEA regulations were originally developed, the U.S. Department of Education included Appendix C, which is a series of questions and answers concerning the IEP.[4] This is the answer to the question of the role of parents at IEP meetings:

> The parents of a child with a disability are expected to be equal participants along with school personnel, in developing, reviewing, and revising the IEP for their child. This is an active role in which the parents (1) provide critical information regarding the strengths of their child and express their concerns for enhancing the education of their child; (2) participate in discussions about the child's need for special education and related services and supplementary aids and services; and (3) join with the other participants in deciding how the child will be involved and progress in the general curriculum and participate in State and district-wide assessments and what services the agency will provide to the child and in what setting. *Id.* Part 300, App. A, Quest. 5 (emphasis added).

Notwithstanding these powerful requirements for full parental participation in the IEP process and the comments from the Supreme Court in *Rowley*, many parents found that they were not viewed by the school as equal participants in the IEP process. Engel, "Law, Culture, and Children with Disabilities: Educational Rights and the Construction of Difference," 1991 Duke Law Journal 166 (1991).

IDEA '97 strengthened the parents' role even further. Perhaps only making explicit what should already have been obvious, schools must now consider the results of evaluations, the strengths of the child and the concerns of the parents for enhancing their child's education when developing the IEP. 20 U.S.C. § 1414(d)(3)(A). Parents must be given the opportunity to participate in meetings regarding the identification, evaluation, educational placement and provision of a FAPE to their children. *Id.* § 1415(b)(1). Finally, parents are now members of the IEP Team. *Id.* § 1414(d)(1)(B). If a different group within a school makes the decision about whether a student has a disability or what the student's actual placement will be, the parents must also be members of that group. *Id.* § 1414(a)(4)(A) and (f).

The new regulations make it clear, however, that parents do not have the right to be present every time school officials discuss their child. The regulations seem to make a distinction between informal discussions and decision making. Accordingly, a meeting, at which the parents have the right to be present, is defined to exclude certain discussions.

> A meeting does not include informal or unscheduled conversations involving [school] personnel and conversations on issues such as teaching methodology, lesson plans, or coordination of service provision if those issues are not addressed in the child's

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[4]Under the new regulations, Appendix C has been moved to Appendix A, and this particular question and answer has been retained, with some modifications. The quote is from the new regulations.

IEP. A meeting also does not include preparatory activities that [school] personnel engage in to develop a proposal or response to a parent proposal that will be discussed at a later meeting. 34 C.F.R. § 300.501(b)(2).

The new regulations also make clear that in light of the parents' role as equal partners with the school, decisions about the IEP should, as much as possible, be reached by consensus. Taking a vote is not considered to be an appropriate way to make decisions. Since the ultimate responsibility to provide a FAPE rests with the school, if consensus cannot be reached, the school must make a decision, which the parents have the right to appeal through use of an impartial hearing or mediation, which are discussed later in this booklet. *Id.* Part 300, App. A, Quest. 9.

2. Evaluating the Child

Developing the IEP begins with a comprehensive, individual evaluation. As one court has noted, the evaluation provides the foundation for the IEP. If the evaluation is incomplete, the IEP cannot be appropriate. *East Penn School District v. Scott B.*, 29 IDELR 1058 (E.D.Pa. 1999). Either the parents or the school staff may initiate an evaluation. In either event, before the school may evaluate a student for the first time, it must obtain parental consent to the evaluation. 20 U.S.C. § 1414(a)(1)(C). The evaluation is to assist the IEP Team in determining whether the student has a disability and, if so, to determine the educational needs of the child. *Id.* § 1414(a)(1)(B). Evaluations must be conducted before the initial provision of services. *Id.* § 1414(a)(1)(A).

The evaluation is to include a review of existing data, including that provided by the parent, and current classroom-based assessments, as well as observations by teachers and related services providers. *Id.* § 1414(c)(1). The evaluation is to be designed to assist in developing the IEP. It must assess the relative contribution of cognitive, behavioral, physical and developmental factors and obtain information about the student's prospects for participating in the general curriculum. *Id.* § 1414(b)(2). The child must be assessed in all areas of suspected disability to determine the present levels of performance and the educational needs of the child. *Id.* §§ 1414(b)(3)(C) and 1414(c)(1)(B)(ii). The evaluation must be sufficiently comprehensive to identify all of the child's needs, whether or not they are commonly linked to the child's classification. 34 C.F.R. § 300.532(h).

No single procedure or criterion may be used. 20 U.S.C. § 1414(b)(2)(B). The evaluation materials may not be racially or culturally discriminatory. They must be administered in the child's native language or other mode of communication "unless it is clearly not feasible to do so." *Id.* § 1414(b)(3)(A).

If the parents disagree with the evaluation obtained by the school, they may request an independent evaluation at school expense. 34 C.F.R. § 300.502(b). Parents should submit their request prior to obtaining the evaluation, but this is not required. *OSEP Policy Letter to Hon. J. Fields*, 2 Education for the Handicapped Law Report (EHLR) 213:259 (1989). The school is allowed to ask the parents for the reasons they are disagreeing with the school's evaluation, but cannot require it. 34 C.F.R. § 300.502(b)(4). In either event, the school must, without unreasonable

delay, either agree to pay for the independent evaluation or initiate a hearing to show its evaluations were appropriate. *Id.* § 300.502(b)(2).

Reevaluations of the student must be conducted at least every three years, and more frequently if conditions warrant or if the teacher or parent requests. 20 U.S.C. § 1414(a)(2)(A). Prior to any reevaluation, the school is now required to seek parental consent. *Id.* § 1414(c)(3). The school may proceed with the reevaluation without the parents' consent if it takes reasonable steps to obtain consent and the parents do not respond. 34 C.F.R. § 300.505(c).

Reevaluations must also be conducted before a student is declassified. 20 U.S.C. § 1414(c)(5). If the school determines, with input from the parents, that no additional assessments are needed to determine whether the child continues to have a disability, it must notify the parents of the basis for that decision and of the parents' right to request an assessment. *Id.* § 1414(c)(1) and (4). Note that the regulations under section 504, which also cover all students identified under IDEA, require a reevaluation before any significant change in placement. 34 C.F.R. § 104.35(d).

3. IEP Team

IDEA requires that the IEP be developed at meeting with a group of people, including the parents. *Id.* § 300.344. The IEP Team must now be composed of the following members:

> (i) the parents of a child with a disability;
>
> (ii) at least one regular education teacher of such child (if the child is, or may be, participating in the regular education environment);
>
> (iii) at least one special education teacher, or where appropriate, at least one special education provider [such as a speech pathologist] of such child;
>
> (iv) a representative of the [school] who–
>
> > (I) is qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of children with disabilities;
> >
> > (II) is knowledgeable about the general curriculum; and
> >
> > (III) is knowledgeable about the availability of resources of the local educational agency;
>
> (v) an individual who can interpret the instructional implications of evaluation results, who may be a member of the team described in clauses (ii) through (vi);
>
> (vi) at the discretion of the parent or the agency, other individuals who have

knowledge or special expertise regarding the child, including related services personnel as appropriate; and

(vii) whenever appropriate, the child with a disability. 20 U.S.C. § 1414(d)(1)(B).

As noted above, the purpose of the regular teacher's involvement in the IEP process is, at least in part, to help determine behavioral strategies, supplemental aids and services, program modifications and supports for school personnel. *Id.* § 1414(d)(3)(C). Depending on the student's needs and the purpose of the meeting, the regular education teacher is not required to attend the entire meeting or be at every single IEP Team meeting.

For example, if the purpose of the meeting is to discuss the physical therapy needs of the student, the regular education teacher may not need to attend if the teacher will not be responsible for implementing that portion of the student's IEP. 34 C.F.R. Part 300, App. A, Quest. 24. The school and parents are encouraged to reach agreement, in advance, concerning the regular education teacher's involvement. *Id.* However, it is anticipated that it will be extremely rare for the regular education teacher not to be in attendance. Federal Register, p. 12583, 3/12/99.

The comments provide extensive guidance regarding which teacher should attend the meeting. For students with more than one regular education teacher, the school can determine which teacher attends, taking into account the best interests of the student. 34 C.F.R. Part 300, App. A, Quest. 26. The teacher:

> [S]hould be a teacher who is, or may be responsible for implementing a portion of the IEP so that the teacher can participate in discussions about how best to teach the child. *Id.*(emphasis added).

The school is strongly encouraged to obtain input from any teachers who will not be attending the meeting. *Id.*

The new regulations also clarify that the school representative on the IEP Team must be someone with the authority to commit school resources and who can ensure that the services set out in the IEP will actually be provided. *Id.*, Quest. 22.

4. IEP Content

The IEP is a written document, setting out in detail the nature of the student's educational needs, the services to be provided and specific goals for the student. The IEP must list the student's present levels of performance, including how the child's disability affects the child's involvement and progress in the general curriculum. The IEP must also list annual goals and short-term objectives or benchmarks. They must be measurable and relate to meeting each of the child's educational needs that result from the disability, including those which will enable the child to be involved in and progress in the general curriculum. 20 U.S.C. § 1414(d)(1)(A)(i) and (ii).

The IEP must include all special education and related services and supplementary aids and services to be provided to the child, or on behalf of the child. It must also list all program modifications, and supports for school personnel which will help the child to: (1) attain the annual goals; (2) participate and progress in the general curriculum, if appropriate; (3) be educated with both disabled and nondisabled peers; and (4) participate in extracurricular and nonacademic activities with both disabled and nondisabled peers. *Id.* § 1414(d)(1)(A)(iii). The projected date for initiating all services and modifications, as well as their anticipated frequency, location and duration must be specified. *Id.* § 1414(d)(1)(A)(vi).

The IEP must also include provisions to assist students in making the transition from school to adult living. These are called transition services. Beginning at age 14, the IEP must include the transition service needs related to the child's course of study under each of the applicable sections of the IEP, such as "participation in advanced-placement courses or a vocational education program." *Id.* § 1414(d)(1)(A)(vii)(I). Beginning at 16, or younger if appropriate, actual transition services are to begin, including identifying the responsibilities of agencies other than the schools to provide services. The IEP must list all such services. *Id.* § 1414(d)(1)(A)(vii)(II). At least one year before a student reaches the age of majority under state law, the IEP must include a statement that the student has been informed of any rights that would normally be exercised by the parents that will transfer to the student at the age of majority. *Id.* § 1414(d)(1)(A)(vii)(III).

The IEP must also list the extent the student will not participate with nondisabled students in academic and nonacademic activities. *Id.* § 1414(d)(1)(A)(iv). If the student is to participate in state or school district-wide assessments of student achievement, the IEP must specify any modifications in the administration of those tests to be given to the student. Modifications could include such things as extra time, having the test read, recording answers in an alternative format (dictating into a tape recorder, to another person or using a computer), use of a calculator, use of an electronic spell checker or other appropriate modifications, based on the needs of the student and subject area being tested. If the student will not be participating, the IEP must give the basis for that decision, as well as indicate how the student will be assessed. *Id.* § 1414(d)(1)(A)(v).

There must be a statement of how the child's progress toward the annual goals will be measured; how the parents will be informed about the child's progress; and the extent to which the child's progress to date is sufficient to enable the child to meet the goals by the end of the year. These progress reports must be at least as frequent as progress reports parents of nondisabled students receive. *Id.* § 1414(d)(1)(A)(viii). Therefore, if a school sends out report cards every 10 weeks, the parents should be notified of their child's progress at least that often. If a school sends out notices when regular education students are in danger of failing at five-week intervals, they could also send out five-week notices to parents of students with disabilities when the student is not performing as expected.

The comments indicate that a written report will normally be sufficient, but there may be instances where a meeting may be more effective. Generally, these reports "are not expected to be lengthy or burdensome." Federal Register, p. 12594, 3/12/99.

The IEP must be reviewed at least annually to determine whether the annual goals are being achieved. It must be revised as necessary. 20 U.S.C. § 1414(d)(4)(A). Therefore, if problems arise during the year or if there is any other need to meet to review the student's program, the parents or school may request a meeting before the year is up. Federal Register, p. 12592, 3/12/99. In other words, the parents do not have to wait for the annual review to request a meeting with the IEP Team.

When developing the IEP, the Team must consider any behavioral interventions needed for students with behavioral needs; the effect of limited English proficiency on a student's special education needs; the use of Braille for blind and visually impaired students; the use of and instruction in the child's language and mode of communication for deaf or hard of hearing students; and, for all students, whether the child requires AT. 20 U.S.C. § 1414(d)(3)(B); 34 C.F.R. § 300.346(a)(2).

A copy of the IEP must be accessible to each regular or special education teacher, as well as any others who are responsible for implementing the IEP. *Id.* § 300.342(b)(2). Additionally, everyone providing services must be informed of their specific responsibilities as well as the specific accommodations, modifications and supports for the student. *Id.* § 300.342(b)(3). The parents must also be given a copy of the IEP, at no charge. *Id.* at 300.345(f).

D. Transition from Special Education to Adult Life

As noted above, schools must begin planning for a student's transition to the adult world beginning at age 14, when curricular options within the school are considered. No later than age 16, a full-blown transition services plan must be included in the IEP.

Transition planning was not part of IDEA when it was first enacted. It was not added until 1990. Prior to adding the transition planning requirements, however, there was strong sentiment that students were not being adequately prepared for the adult world. Accordingly, transition planning requires that schools develop a long-range plan for students to prepare them for post-school life, begin to make connections with adult service providers while students are still in school and look to others, such as the vocational rehabilitation (VR) system, to provide services.

1. Transition Services

Transition services are defined as a coordinated set of activities for a student, designed within an outcome-oriented process, that promotes movement from school to post-school activities. The areas of adult living to be considered include preparation for postsecondary education, vocational training, integrated employment (including supported employment), continuing and adult education, adult services, independent living, and community participation. IDEA '97 added related services to the types of services to be provided, thereby removing any doubt that transition services may include AT. *Id.* § 1401(30)(C). Therefore, transition services may be either special education or related services. 34 C.F.R. § 300.29(b).

Services are to be based on the individual student's needs, taking into account the student's

preferences and interests. The specific services to be offered include: (1) instruction, (2) related services, (3) community experiences, (4) development of employment and other post-school adult living objectives, and (5) if appropriate, acquisition of daily living skills and a functional vocational evaluation. 20 U.S.C. § 1401(30); 34 C.F.R. § 300.29(a). The list of activities is not intended to be exhaustive. Federal Register, p. 12553, 3/12/99. One court noted that specially designed instruction in driver's education, self-advocacy, and independent living skills such as cooking and cleaning were appropriate transition services for a student with an orthopedic impairment who wanted to attend college. *Yankton School Dist. v. Schramm*, 93 F.3d 1369,1374 (8th Cir. 1996).

The 1990 amendments to IDEA added rehabilitation counseling services to the definition of related services. 20 U.S.C. § 1401(22). Rehabilitation counseling services are to be provided by qualified personnel in individual or group sessions. They are to focus specifically on career development, employment preparation, and achieving independence and integration in the workplace and community. They include vocational rehabilitation (VR) services provided to students with disabilities by VR programs funded under the Rehabilitation Act. 34 C.F.R. § 300.24(b)(11).

2. Developing a Transition Services IEP

If an IEP meeting is to consider transition services for a student, the school must invite the student and a representative of any other agency that is likely to be responsible for providing or paying for transition services. If the student does not attend, the school must take other steps to ensure that the student's preferences and interests are considered. If an invited representative does not attend, the school must take other steps to obtain the participation of that agency in the planning of any transition services. *Id.* § 300.344(b).

As noted above, beginning at age 14, the IEP must include the transition service needs related to the child's course of study under each of the applicable sections of the IEP, such as "participation in advanced-placement courses or a vocational education program." 20 U.S.C. § 1414(d)(1)(A)(vii)(I). Beginning at 16, or younger if appropriate, actual transition services are to begin. The IEP must list all needed services under each area of transition, including responsibilities of other agencies to provide services and any linkages to be developed with other agencies. *Id.* § 1414(d)(1)(A)(vii)(II); 34 C.F.R. § 300.347(b).

As with other parts of the IEP, the transition planning requirements are much more than mere technicalities. One court recently found that a school which only provided for the vocational needs of the student, failed to meet its transition obligations to him. It did not develop a plan to help the student "survive an adult life." In other words, the plan was not functional. The court noted the school: (1) did not identify any goals for the student for after he left school; (2) did not perform any transition evaluations, other than a vocational evaluation; (3) did not provide "the full panoply of services that transition planning envisions" to prepare him for life outside of school in such areas as personal needs, getting around the community and recreation; and (4) failed to meet his individual, unique needs and instead placed him in an existing generic program with minor adaptations. *East Penn School District v. Scot B.*, 29 IDELR 1058 (E.D.Pa. 1999).

3. Special Education and Vocational Rehabilitation Services

Many state vocational rehabilitation (VR) agencies are unwilling to get involved with students until their right to an appropriate special education is over, citing VR rules that limit VR services when there is another possible source of funding for those services. This is referred to as the "comparable benefits" requirement. Where AT is involved, this can be a significant problem. Schools do not normally consider AT devices purchased to ensure an appropriate education to be the student's property. *See* Federal Register, p. 12540, 3/12/99. If the AT device will also be essential for college or employment, significant delays will result if the VR process does not begin until after a student leaves school. It also makes little fiscal sense for a school to provide AT, merely to be surrendered upon graduation with the student then seeking another device from the VR agency. What is the VR agency's responsibility under these circumstances?

a. Obligations Under IDEA

It is clear that when transition planning was added to IDEA in 1990, VR agencies, and other public agencies with responsibilities for students, were intended to be involved both in the planning process with schools and in the actual provision of services. The legislative history suggests that the statement of needed transition services should include a commitment by any participating agency to meet any financial responsibility it may have in the provision of transition services. *See* House Report No. 101-544, p. 11, 1990 U.S. Code Cong. & Admin. News, pp. 1733-34. A "participating agency" means a state or local agency, other than the school, that is financially and legally responsible for providing transition services to the student. 34 C.F.R. § 300.340(b). If a participating agency fails to provide agreed-upon transition services contained in the IEP, the school must initiate a meeting as soon as possible to identify alternative strategies to meet the transition objectives and, if necessary, revise the IEP. *Id.* § 300.348(a).

VR agencies are specifically referred to in the IDEA regulations. As noted above, rehabilitation counseling includes services provided by the VR agency. *Id.* § 300.24(b)(11). The definition of AT services includes coordinating other services with AT devices "such as those associated with existing education and rehabilitation plans and programs." 20 U.S.C. § 1401(2)(D)(emphasis added). The regulations also note that nothing in the transition services requirements relieves any participating agency, "including a State [VR] agency," of the responsibility to provide or pay for any transition service that the agency would otherwise provide. 34 C.F.R. § 300.348(b).

IDEA '97 strengthened the obligations of other public agencies to provide services to students while they are still in school. All states must now have interagency agreements to ensure that all public agencies that are responsible for providing services that are also considered special education services, fulfill their responsibilities. The financial responsibility of these public agencies must precede that of the school. If an agency does not fulfill its obligation, the school must provide the needed services, but has the right to seek reimbursement from the public agency. The agreement must also specify how the various agencies will cooperate to ensure the timely and appropriate delivery of

services to the students. 20 U.S.C. § 1412(a)(12).

b. Obligations Under the VR Laws

During the same time that changes were being made to IDEA, there were also changes being made to the VR laws concerning the role of VR agencies in the transition process. Based on 1992 changes to the VR laws, the VR regulations require the state VR Plan to develop policies to facilitate the transition from the special education system to the VR system. The VR regulations contemplate the development of an individualized plan for employment (IPE) by the VR system, for students eligible for VR services, before the student leaves the school setting. 34 C.F.R. § 361.22(a)(1).

But, the legislative history to the 1992 VR laws, the Rehabilitation Act Amendments of 1992, Pub. L. 102-569, 106 Stat. 4346, states that schools remain responsible for ensuring a free appropriate public education to students during the transition years. S. Rep. No. 357, 102d Cong., 2d. Sess., 33 (1992), as quoted at 34 C.F.R. § 361.22, Note. This seems to contradict the requirements of IDEA, discussed above. However, the law's intent is to ensure that "there is no gap in services between the education system and the vocational rehabilitation system." *Id.*

The laws governing VR agencies were again amended in 1998. Among other changes, the law more clearly identifies the responsibilities of the VR system to special education students, and, hopefully, removes the apparent contradiction. The State Plan for VR services must now include procedures to facilitate the transition of students with disabilities from the special education system to the VR system, including: (1) consultation and assistance to the educational agencies in preparing the transition plan in the IEP; and (2) defining the relative roles and financial responsibilities of the special education and VR systems to provide services. 29 U.S.C. § 721(a)(11)(D).

Subject to the State VR Plan, the VR agency is required to provide services to students to facilitate achievement of the employment outcome as spelled out in the IPE. Congressional Record–House, H6693, July 29, 1998. "However, State [VR] agencies should not interpret the 'interagency agreement' provisions as shifting the obligation for paying for specific transition services normally provided by those agencies to local school districts. State [VR] agencies still have that responsibility." *Id.*

c. Reading IDEA and the VR Laws Together

What is the effect of all of these requirements for the student who needs an AT device? First, the VR agency may and should participate in the transition planning meetings with the school. Second, if the graduating student clearly will need the AT device for educational, training or employment purposes, a reasonable approach would be to have the VR agency purchase the device in the first instance or purchase it from the school when the student graduates. The need for the device would continue to be reflected in the IEP, with reference to the VR agency as payer (or purchaser upon transfer). The AT device would also appear in the individualized plan for employment (IPE), which must be developed by the VR agency before the child finishes school.

Neither IDEA nor the federal VR laws prohibit the VR agency from purchasing the AT outright for the student while still enrolled in high school or from purchasing it from the school. The IDEA regulations envision other agencies providing services to students in transition, including VR agencies. 34 C.F.R. § 300.348. The VR regulations require that the State Plan specify the respective financial responsibility of the various state agencies serving the student. *Id.* § 361.22(a)(2)(v).

E. Private School Placements

As noted above, as part of the continuum of services, schools must have available the option of placing students in special (or private) schools. *Id.* § 300.551. When schools place a student in a private school to meet their obligation to provide a FAPE, the services are to be at no cost to the family and an IEP must be developed. *Id.* §§ 300.349 and 300.401.

What are a school's obligations when parents place students in private or parochial schools? Must schools pay for the tuition costs? Must the school provide services to all students enrolled in private schools? May a school refuse to provide services on the site of a parochial school because of the First Amendment? Are there circumstances where parents will be reimbursed for private school costs?

1. Services to Students in Private and Parochial Schools

If the school offers a FAPE to the student but the parents decide to enroll the student in a private or parochial school, the school is not responsible for the tuition. *Id.* § 300.403(a). The next question is: may a school provide services on the site of a parochial school, which by definition is run by a religious entity, or does that violate the Establishment Clause of the First Amendment, which prohibits government support of religion? IDEA '97 states that special education and related services (which can, of course, include AT) may be provided on the site of a parochial school "to the extent consistent with law." 20 U.S.C. § 1412(a)(10)(A)(i)(II). What is "consistent with law?"

The leading case in this field is *Zobrest v. Catalina Foothills School District*, 509 U.S. 1 (1993). In that case, the Supreme Court held that providing a sign language interpreter to a deaf student attending a parochial high school did not violate the Establishment Clause. Relying on the Supreme Court's analysis, the United States Court of Appeals for the Second Circuit ruled that the Establishment Clause did not prohibit the provision of a teacher aide and special education "consultant" teacher on the grounds of a parochial school. *Russman v. Sobol*, 85 F.3d 1050 (2d Cir. 1996), *vacated on other grounds*, ___ U.S. ___, 117 S.Ct. 2502 (1997).

IDEA '97 placed limits on the amount schools must spend on providing services to students enrolled by their parents in private schools. It provides that a school must spend a "proportionate share" of its IDEA dollars for students enrolled in private schools. 20 U.S.C. § 1412(a)(10)(A)(i)(I). Following the passage of IDEA '97, the Supreme Court ordered that the Second Circuit (and several other Circuits) reconsider their decisions in the light of this language. *See Board of Educ. v. Russman*, ___ U.S. ___, 117 S.Ct. 2502 (1997).

In 1998, the Second Circuit reaffirmed its position that the Establishment Clause is not violated when services are provided on a parochial school site. However, the court determined that the IDEA '97 language means that a school is not required to provide services on site. Moreover, the school is only required to spend a proportionate share of its federal dollars on services to students enrolled in private schools. Schools need not spend their own, non-federal, funds on these students. *Russman By Russman v. Mills*, 150 F.3d 219 (2d Cir. 1998). The other courts to address this question have also ruled similarly. *See, e.g., Peter v. Wedl*, 155 F.3d 992 (8th Cir. 1998); *Foley v. Special School Dist. of St. Louis County*, 153 F.3d 863 (8th Cir. 1998); *Fowler v. Unified Sch. Dist. No. 259*, 128 F.3d 1431 (10th Cir. 1997); *K.R. v. Anderson Community Sch. Corp.*, 125 F.3d 1017 (7th Cir. 1997); *Cefalu v. East Baton Rouge Parish School Bd.*, 117 F.3d 231 (5th Cir. 1997).

The new regulations make it clear that students voluntarily enrolled in private schools by their parents have no individual right to services. The schools must meet with private school representatives to determine the number and needs of private school children and how those needs will be met. Instead of an IEP, a services plan will be developed by the IEP Team for those students who will receive services. 34 C.F.R. § 300.454. If the parents wish to appeal the decision of the IEP Team, they cannot use the impartial hearing process, which will be discussed below. They must use the complaint resolution procedure (CRP), which is also discussed below. *Id.* § 300.457.

The regulations reaffirm that services may be provided on-site "to the extent consistent with law." *Id.* § 300.456(a). The comments note that providing services on-site is preferred, "to cause the least disruption in the children's education." Federal Register, p. 12604, 3/12/99. They also note there must be flexibility to take into account local conditions. *Id.* If services are not provided on-site, the school district must provide transportation to and from the site, if needed for the student to benefit from or participate in the service. 34 C.F.R. § 300.456(b).

The comments also make clear that states and local school districts "are not prohibited from providing services to private school children with disabilities beyond those required by this part, consistent with State law or local policy." Federal Register, p. 12410, 3/12/99, regarding 34 C.F.R. § 300.453(d). Therefore, a state or school could choose to mandate services to all students in these schools.

For example, New York creates a right to a FAPE for all students attending private or parochial schools. N.Y. Educ. Law § 3602-c. Services may be provided on site, at a neutral site or at a school site, depending on what is appropriate. *See* N.Y. State Education Department Memo from Kathy Ahearn, Counsel and Deputy Commissioner for Legal Affairs (September 1998). Of course, it is virtually impossible to envision any AT which could be appropriately provided anywhere other than on site. Kansas law also provides services for students with disabilities attending private schools. Kan. Stat. Ann. § 72-5393; *Fowler v. Unified Sch. Dist. No. 259*, 128 F.3d 1431, 1439 (10th Cir. 1997). In *John T. v. Marion Ind. Sch. Dist.*, 30 IDELR 262 (8th Cir. 1999), the court held that Iowa law required a school district to provide a full-time aide to a student attending a parochial school.

2. Unilateral Private School Placements

What if a parent contends that the school did not offer a FAPE? As will be noted below, in such circumstances, the parents have the right to request an impartial hearing, but the child is to remain in the current educational setting pending completion of this process. Must the child remain in what the parents maintain is an inappropriate setting? If the parents can afford to move the student to a different setting may they obtain reimbursement?

Since 1985, when the Supreme Court decided *Burlington Sch. Comm. v. Department of Educ.*, 471 U.S. 359 (1985), in certain circumstances, parents are able to obtain reimbursement for unilateral placements in private schools when the school did not offer a FAPE. The Court set up a three-prong test. The parents must establish: (1) that the school did not offer an appropriate placement; (2) that the program selected by the parents is appropriate; and (3) that equity factors favor reimbursement. In *Florence County School Dist. Four v. Carter*, 510 U.S. 7 (1993), the Supreme Court held that if the other prongs of the test were met, the parents could obtain reimbursement even if the program was not approved by the state's educational agency.

IDEA '97 codifies, with some modifications, these decisions. Parents may obtain reimbursement from a court or hearing officer if the school did not offer a FAPE in a timely manner and the private placement selected by the parents is appropriate. The private placement can be appropriate even if it does not meet state standards applicable to school districts. 34 C.F.R. § 300.403(c); Federal Register, p. 12602, 3/12/99.

However, the parents must first inform the school, at either the IEP meeting or by letter, of their concerns with the school's proposal, that they are rejecting the school's proposed placement and that they intend to place their child in a private school at school district expense. The parents' request for reimbursement may also be denied if they refuse to make their child available for an evaluation by the school or if a court finds that they otherwise acted unreasonably. Prior notice is not required if the parents are illiterate, if compliance would endanger the child, if the school prevented the parents from providing the notice or if the school did not notify the parents of their rights. 20 U.S.C. § 1412(a)(10)(C).

F. Due Process Protections

1. General Due Process Requirements

As noted in the IEP section above, the Supreme Court emphasized the importance of the procedures set up by IDEA. Indeed, the rights given to parents of students with disabilities by IDEA are significantly greater than the rights given parents of regular education students. Parents of students with disabilities are co-partners with school personnel in determining the goals and services to be provided. If they disagree with the decision, they have the right to a formal, impartial review of the school's recommendations. These rights, which are referred to as "procedural safeguards" in IDEA, come from the Due Process Clause of the U.S. Constitution.

Schools must regularly and fully inform parents of their due process rights. *Id.* § 1415(b)(3), (c) and (d)(2). Prior to taking any action regarding the student, they must also notify the parents of the basis for their action. This notice must include: (1) a description of the action proposed or refused; (2) an explanation of why the school made the decision; (3) a description of any other options considered and an explanation of why they were rejected; (4) a description of the records, reports or evaluations used as a basis for the decision; and (5) a description of any other factors that are relevant to the decision. *Id.* § 1415(c).

All parents have the right to review copies of their children's educational records and to request that false, misleading or personally invasive records be amended or removed pursuant to the Family Educational Rights and Privacy Act. *Id.* § 1232g. The parents of children with disabilities also have the right to a copy of the evaluations conducted by the school. *Id.* § 1414(b)(4)(B). Finally, when the records relating to a student's special education are no longer needed, the parents have the right to have them destroyed. 34 C.F.R. § 300.573.

Under IDEA, parents have the right to request an impartial hearing to appeal all actions taken by a school. 20 U.S.C. § 1415(b)(6). At the hearing, the parents have the right to be represented by an attorney or other person with specialized training, to compel the attendance of witnesses, to present evidence and to cross-examine witnesses. *Id.* § 1415(f). The parents have the right to a written, or, at their option, electronic, verbatim transcript of the hearing. 34 C.F.R. § 300.509(a)(4). Impartial hearings have become extremely technical and complicated. Therefore, it is highly advisable for parents to contact an attorney or trained advocate if they believe it is necessary to request a hearing.

The decision of the hearing officer is final, unless there is an appeal. 20 U.S.C. § 1415(i)(1)(B). States have the option to create a second, state level of administrative review. In that case either the parents or school have the right to file an appeal to the state. *Id.* § 1415(g). Following the hearing decision or state level decision, if applicable, either the parents or the school have the right to appeal to state or federal court. *Id.* § 1415(i)(2).

2. Status Quo: The Right to Retain Existing Services Pending Appeal

The child remains in the current educational placement during all of the above proceedings, unless the parent and school or state agree otherwise. *Id.* § 1415(j); 34 C.F.R. § 300.514(a). This is referred to as "pendency," "stay put," or "status quo." Status quo applies to the services listed in the IEP as well as "the setting in which the IEP is implemented, such as a regular" or self-contained classroom. Federal Register, p. 12616, 3/12/99. However, a school may change the location of a child's classroom within the school district. *Id.*, *Concerned Parents v. N.Y.C. Bd. of Ed.*, 629 F.2d 751 (2nd Cir. 1980). Status quo is also not intended to require that a student remain in the same grade pending an appeal. Federal Register, p. 12616, 3/12/99. Status quo also applies to children moving from one school to another within the state. *OSEP Policy Letter to L. Rieser*, EHLR 211:403 (7/17/86). However, status quo does not apply when a student moves from one state to another. *Michael C. v. Radnor Township School District*, 29 IDELR 958 (E.D.Pa. 1999); *OSEP Policy*

Memorandum 96-5, 24 IDELR 320 (12/6/95).

What if a parent is only challenging part of the IEP? Let's say the parent and school agree that the student should have a computer in school to work on written assignments, but disagree on whether the student may have the computer for use at home on homework. May the school refuse to provide the computer at school, while the hearing on the use of the computer at home proceeds? The new regulations clarify that a school cannot use a parent's refusal to consent to one service or benefit as a basis to deny another service or benefit. 34 C.F.R. § 300.505(e). Therefore, the school should implement agreed upon services, such as the computer for use at school, pending resolution of a disagreement about other services. *See* Federal Register, p. 12610, 3/12/99.

What if the parents prevail at a state level impartial hearing or at the state review office and the school is ordered to provide the computer for use in the home? If the school appeals to court, may it refuse to implement the state's decision based on the status quo requirements? Again, the new regulations clarify that if the state level hearing or review officer rules in the parents' favor, that constitutes an agreement between the parents and state for purposes of status quo. *Id.* § 300.514(c). Accordingly, the school would have to provide the computer during any subsequent appeals.

Status quo can be a real "two-edged" sword for parents. If the parents like the services or program and the school seeks to make a change, the parents can maintain the student in the program while the review procedures take place. If the parents are seeking a change, say to add AT, and the school refuses, then the student's program would not change while the review proceeds. As noted above, however, the parents can be reimbursed if they change the student's program unilaterally and they meet the criteria set up by the Supreme Court in *Burlington* and *Carter*.

3. Compensatory Education

What if the school fails to implement the IEP or fails to provide a FAPE in some other way, but the parents are unable to provide the services at their own expense? In such a case, the right to get reimbursed does not help. Is there any other remedy available, if, for example, the school does not obtain the AT device called for in the IEP? As noted above, the right to a FAPE ends at the age of 21. Can a student receive special education services after the age of 21 as a remedy to compensate for the failure to provide services earlier?

In *Burr v. Ambach*, 863 F.2d 1071 (2nd Cir. 1988), the student, who was 20 at the time of the decision, was without any educational programing for almost two years because of unnecessary delays in the impartial hearing and review process. The court noted that even though IDEA limited the right to a FAPE until the age of 21, there needed to be some way to provide a remedy for the clear deprivation of his right to a FAPE. Accordingly, the court approved the provision of special education services beyond his 21st birthday. Another form of compensatory education can be to provide special education services during the summer, even though the student might not have been entitled to summer services, instead of waiting until after the student reached the age of 21. *See Johnson v. Bismark Pub. Sch. Dist.*, 949 F.2d 1000 (8th Cir. 1991).

In *M.C. on Behalf of J.C. v. Central Regional School*, 81 F.3d 389 (3rd Cir. 1996), the court rejected a requirement that there be a "gross" violation to the right to a FAPE, as occurred in *Burr*. The court held that the right to compensatory education is based simply on whether the IEP is appropriate. The right to compensatory education begins when the school knows or should know that the student is not receiving a FAPE. *Id.* at 396; *See* Perry A. Zirkel, *The Remedy of Compensatory Education under the IDEA*, 95 Ed. Law Rep. 483 (1995).

Applying the standards articulated in the *M.C.* case, a school was ordered to provide two years of compensatory education because it failed to provide appropriate AT devices and services to a student. The court noted that the school "dragged its feet" in acquiring the AT device, a laptop computer with a word prediction program, and in training the staff so the student "could realize some benefit from the technology." *East Penn School District v. Scott B.*, 29 IDELR 1058, 1063 (E.D.Pa. 1999).

4. Mediation

The statute now mandates that states and schools have available a mediation process to resolve any and all complaints, at least whenever an impartial hearing is requested. Mediation is to be voluntary and cannot be used to deny or delay a parent's right to an impartial hearing. But, if a parent does not choose to use mediation, a school or state may establish a procedure requiring the parent to meet with a specified disinterested party to explain the benefits of mediation. 20 U.S.C. § 1415(e).

The state shall bear the costs of mediation. The mediators are to be impartial, trained in mediation techniques and knowledgeable of special education law. All discussions during mediation sessions are to be confidential. *Id.*

5. Attorneys' Fees are Available When the Student Wins an Appeal

When parents request an impartial hearing, they are entitled to reasonable attorneys' fees if they ultimately prevail at the hearing, on review, in court, or through settlement. The fees are to based on the prevailing rates in the community. The parents' fees may be reduced if they reject an offer of settlement made by the school, in writing, and received at least 10 days before the hearing, if the relief they obtain is not more favorable than the school's offer of settlement. 20 U.S.C. § 1415(i)(3).

IDEA '97 places some new restrictions on the availability of attorneys' fees. With a request for an impartial hearing there must be a statement listing the student's name, address and school attended, as well as a description of the problem giving rise to the hearing request and a proposed resolution of the problem to the extent known and available. *Id.* § 1415(b)(7). If this statement was not submitted, attorneys' fees can be limited. *Id.* § 1415(i)(3)(F)(iv).

Attorneys' fees are also not available for IEP Team meetings unless the meeting has been

convened as a result of an impartial hearing or court decision. However, states may authorize attorneys' fees for participation in pre-hearing mediation. *Id.* § 1415(i)(3)(D)(ii).

G. Discipline of Students with Disabilities

1. Introduction

To what extent do the rights of students with disabilities differ from nondisabled students in the disciplinary process? As noted above, the program for a student with a disability is supposed to be developed by the IEP Team and if the parents request an impartial hearing, the student is supposed to remain in the current placement pending review. How do these rights come into play when a student is suspended by the school? Does it make a difference if the suspension is for a long or short period?

In *Honig v. Doe*, 484 U.S. 305 (1988), the United States Supreme Court provided some answers to these questions. The Court held that suspensions for greater than 10 days constituted a "change in placement." Accordingly, the IEP Team would have to be involved in long term suspensions. Moreover, if the parents requested an impartial hearing to appeal any decisions from the IEP Team, the status quo provisions would apply and the student would have to be returned to his or her prior placement while the hearing proceeded. The Court did allow for an exception for dangerous students. Schools could get a court order to change a dangerous student's placement during the review process.

2. IDEA '97

IDEA '97 makes several changes in the procedures for disciplining students with disabilities. While this booklet will not go into depth on this subject, a few brief comments can be made.

States must determine if there are discrepancies between the long term suspension or expulsion rates of students with disabilities across schools in the state or when compared to nondisabled students within schools. If so, the state must review and, if necessary, order the revision of policies in the school relating to developing and implementing IEPs, use of behavioral interventions and procedural safeguards. 20 U.S.C. § 1412(a)(22).

The statute also codifies *Honig v. Doe*, with some twists. Because *Honig v. Doe* was an interpretation of IDEA, now that IDEA has been amended these new procedures must be followed. The U.S. Department of Education has stated, however, that in addition to using the hearing officer process discussed below to change a student's placement, schools may still go to court to change the status quo of a dangerous student, as set out in *Honig v. Doe*. *OSEP Memorandum 97-7*, 26 IDELR 981 (9/19/97).

Regarding short term suspensions, for less than 10 consecutive school days, the new regulations make it clear that these suspensions are not a change in placement. 34 C.F.R. §

300.520(a)(1)(i). Therefore, a student need not go before the IEP Team for a short term suspension. During the course of a short term suspension, and up to the time a student has been removed for 10 days during the school year, the school does not have to provide educational services to the student, unless state law requires that nondisabled students receive educational services during that time. Once a student has been suspended for a total of 10 days, however, educational services must be provided during any subsequent short term suspensions. *Id.* § 300.520(a)(1)(ii).

If a student is subjected to a series of short term suspensions, this may be considered a "change in placement," requiring the involvement of the IEP Team, as discussed below. The new regulations indicate that a change in placement occurs if the short term suspensions constitute a pattern because they cumulate to more than 10 school days and because of other factors such as their length and proximity to one another. *Id.* § 300.519(b).

Before a student may be suspended for more than 10 consecutive school days, there must be an IEP Team meeting to determine whether or not the student's misconduct is a "manifestation" of the disability. 20 U.S.C. § 1415)k)(4)(A). If there is a connection to the disability, and drugs or weapons were involved or the student's current placement is substantially likely to result in injury to the student or others, the student may be placed in an interim alternative educational setting for up to 45 days. *Id.* § 1415(k)(1)(A)(ii), (k)(2) and (k)(3)(A). The alternative setting must enable the child to receive the services specified on the IEP and include services to ensure that the behavior does not recur. *Id.* § 1415(k)(3)(B). If there is a connection to the disability, and the requirements for placement in an interim alternative educational setting are not met, the recommendation of the IEP Team controls the student's program.

If there is no connection between the student's misconduct and his or her disability, the student may be disciplined in the same way as any other student. *Id.* § 1415(k)(5)(A). However, the school must continue to provide a FAPE (which includes AT), even if there is no connection. *Id.* §§ 1412(a)(1)(A) and 1415(k)(5)(A).

In making the "manifestation" decision, the school must look at all relevant information, including evaluations, observations, and the student's IEP and placement, and consider the following: (1) whether the IEP and placement were appropriate, including whether behavior intervention strategies were provided consistent with the IEP; (2) whether the student's disability impaired the ability to understand the consequences of his or her conduct; and (3) whether the disability impaired the student's ability to control the behavior in question. *Id.* § 1415(k)(4)(C).

Parents may request an impartial hearing to review the decision to place the student in an interim alternative placement as well as the "manifestation" decision. However, during the appeal the student would remain in the interim placement, at least for 45 days. *Id.* § 1415(k)(7).

Students who have not been classified as disabled by the special education system may avail themselves of these procedural safeguards if the school knew that they were disabled before the behavior giving rise to the discipline occurred. The school will be deemed to know the student was

disabled if: (1) the parents expressed concern, in writing, that the student may need special education, or they had referred the student for a special education evaluation; (2) the behavior or performance of the student demonstrated a need for special education assistance; or (3) a school employee expressed concern about the student's behavior or performance to the school's special education director or other school personnel in accordance with the school's child find or special education referral system. *Id.* § 1415(k)(8); 34 C.F.R. § 300.567(b)(4).

III. ASSISTIVE TECHNOLOGY REQUIREMENTS UNDER IDEA

A. History

1. Technology-Related Assistance for Individuals with Disabilities Act of 1998

Interest in AT grew with the passage of the Technology-Related Assistance for Individuals with Disabilities Act of 1988 (Tech Act). P.L. 100-407, 102 Stat. 1044, 29 U.S.C. §§ 2201, *et seq.* The Tech Act defined both AT "devices" and "services":

> The term "assistive technology device" means any item, piece of equipment, or product system, whether acquired commercially off the shelf, modified, or customized, that is used to increase, maintain, or improve functional capabilities of individuals with disabilities. *Id.* § 2202(2).

> The term "assistive technology service" means any service that directly assists an individual with a disability in the selection, acquisition, or use of an assistive technology device. Such term includes--
> (A) the evaluation of the needs of an individual with a disability, including a functional evaluation of the individual in the individual's customary environment;
> (B) purchasing, leasing, or otherwise providing for the acquisition of assistive technology devices by individuals with disabilities;
> (C) selecting, designing, fitting, customizing, adapting, applying, maintaining, repairing, or replacing of assistive technology devices;
> (D) coordinating and using other therapies, interventions, or services with assistive technology devices, such as those associated with existing education and rehabilitation plans and programs;
> (E) training or technical assistance for an individual with disabilities, or, where appropriate, the family members, guardians, advocates, or authorized representatives of such an individual; and
> (F) training or technical assistance for professionals (including individuals providing education and rehabilitation services), employers, or other individuals who provide services to, employ, or are otherwise substantially involved in the major life functions of individuals with disabilities. *Id.* § 2202(3).

The legislative history to the Tech Act indicates the broad range of AT devices that were contemplated:

> The Committee includes this broad definition to provide maximum flexibility to enable States to address the varying needs of individuals of all ages with all categories of disabilities and to make it clear that simple adaptations to equipment are included under the definition as are low and high technology items and software. Senate Report No. 100-438, 1988 U.S. Code Cong. & Admin. News, p. 1405.

2. IDEA Amendments of 1990

The definitions of AT devices and services were added to IDEA by the Education of the Handicapped Act Amendments of 1990. P.L. 101-476, 104 Stat. 1103. This statute adopted, almost verbatim, the definitions of AT devices and services from the Tech Act.

The legislative history underscored Congress' view of the role AT could play in the education of students with disabilities. Congress noted that advances in AT have provided new opportunities for students with disabilities to participate in educational programs. For many, the provision of AT "will redefine an 'appropriate placement in the least restrictive environment' and allow greater independence and productivity." House Report No. 101-544, 1990 U.S. Code Cong. & Admin. News, p. 1730. AT was added in order:

> (1) to clarify the broad range of assistive technology devices and related services that are available, and (2) to increase the awareness of assistive technology as an important component of meeting the special education and related service needs of many students with disabilities, and thus enable them to participate in, and benefit from, educational programs. *Id.*, p. 1731 (emphasis added).

The IDEA definition for an AT device is found at 20 U.S.C. § 1401(1) and 34 C.F.R. § 300.5. The definition for an AT service is found at 20 U.S.C. § 1401(2) and 34 C.F.R. § 300.6. In *In the Matter of the Adoption of Amendments to N.J.A.C. 6:28-2.10, 3.6 AND 4.3*, 27 IDELR 27 (N.J. Sup. Ct., App. Div. 1997), the court invalidated New Jersey's AT regulations covering "any specialized equipment and materials" because they failed to define the term to ensure compliance with the definitions in IDEA.

3. IDEA '97

With the passage of IDEA '97, Congress again emphasized AT. As noted above, the need for AT must now be considered for all students when developing the IEP. 20 U.S.C. § 1414(d)(3)(B)(v), 34 C.F.R. § 300.346(a)(2)(v). The comments to the new regulations make it clear that it is "mandatory for the IEP team to consider each child's AT needs." In doing so, however, the school is not required to document in writing its consideration of AT for each student. Federal Register, pp. 12590-91, 3/12/99.

The comments to the 1999 regulations also make it clear that AT encompasses the individual student's own personal needs for AT, such as "electronic notetakers, cassette recorders, etc.," as well as access to AT devices used by all students. If a student needs accommodations to use an AT device used by all students, the school "must ensure that the necessary accommodation is provided." *Id.*, p. 12540.

Orientation and mobility (O&M) services were added to the definition of related services. 20 U.S.C. § 1401(22). O&M services can involve, in appropriate cases, the use of AT. O&M services are to be provided to blind or visually impaired students to enable them to "attain systematic orientation to and safe movement within their environments in school, home and community." 34 C.F.R. § 300.24(b)(6)(emphasis added).

The new regulations add "travel training" to the definition of special education. *Id.* § 300.26(a)(1)(ii). Travel training may be provided, as needed, to any student with a disability to teach the student to move effectively and safely within the student's environment "(e.g., in school, in the home, at work, and in the community)." *Id.* § 300.26(b)(4)(emphasis added).

Finally, the new regulations note the importance of AT to allow students with disabilities to be transported with their nondisabled peers:

> For some children with disabilities, integrated transportation may be achieved by providing needed accommodations such as lifts and other equipment adaptations on regular school transportation vehicles. *Id.* Part 300, App. A, Quest. 33 (emphasis added).

The comments to the new regulations emphasize that it is assumed that most children with disabilities will receive the same transportation provided to nondisabled children. If the child needs transportation to receive a FAPE or needs "accommodations or modifications to participate in integrated transportation with nondisabled children, the child must receive the necessary transportation or accommodations at no cost to the parents." Federal Register, p. 12551, 3/12/99 (emphasis added).

B. General Standards for Obtaining AT

1. Basic Eligibility Criteria

The first major policy announcement from the U.S. Department of Education's Office of Special Education Programs (OSEP) concerning AT was actually published before the AT definitions were added to IDEA. Over the years, OSEP has issued many other policy letters interpreting schools' obligations to provide AT. A number of them will be summarized here.

As with any other special education service, the need for AT must be determined on a case-by-case basis, considering the unique needs of each child. *OSEP Policy Letter to Anonymous*, 29

IDELR 1089 (11/6/97). The regulations require that AT devices and services are made available to any student with a disability, "if required." 34 C.F.R. § 300.308. The basic standard to be met is whether the student needs the AT to receive a FAPE. *OSEP Policy Letter to S. Goodman*, 16 Education for the Handicapped Law Reports (EHLR) 1317 (8/10/90); 34 C.F.R. § 300.308.

The question to be considered is the relationship between the educational needs of the student and the AT device or service. *OSEP Policy Letter to D. Naon*, 22 IDELR 888 (1/26/95). As noted above, "supplementary aids and services" can be used to assist a student in nonacademic, educationally-related settings. Therefore, when looking at the AT needs for a student, the "educational" needs must also include these nonacademic settings. *See* 20 U.S.C. § 1401(29) and 34 C.F.R. § 300.306.

AT may be considered as special education, related services, or "supplementary aids and services" to maintain a student in the LRE.[5] 34 C.F.R. § 300.308(a). A 1997 OSEP Policy Letter had this to say about the decision making process for AT and including AT on the IEP:

> The IEP team's decision about any assistive technology needs is made on a case-by-case basis, taking into consideration the unique needs of each individual child. If the IEP team determines that a student with disabilities requires assistive technology, such as a personal computer, in order to receive FAPE, and designates such assistive technology as either special education or related service, the IEP must include a specific statement describing such service, including the nature and amount of such services. *OSEP Policy Letter to* Anonymous, 29 IDELR 1089 (1/6/97). *See OSEP Policy Letter to S. Goodman*, 16 EHLR 1317 (8/10/90); *OSEP Policy Letter to B. Orenich*, EHLR 213:166 (8/9/88); *OSEP Policy Letter to R. Shelby*, 21 IDELR 61 (1/26/95).

Note that because IDEA '97 now defines "supplementary aids and services" and requires that those services also appear on the IEP, the above quote should be modified to indicate that if the AT is considered a supplemental aid or service it still must be included on the IEP. *See* 20 U.S.C. § 1414(d)(1)(A)(iii).

The new regulations add provisions for services during the summer months, called "extended school year (ESY) services." Eligibility must be determined on an individual basis and ESY services must be provided, if needed to ensure the student receives a FAPE. ESY services cannot be limited to particular categories of disability and schools may not "unilaterally limit the type, amount or duration" of ESY services. 34 C.F.R. § 300.309. The comments note that states are free to establish

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[5]For a student with a disability whose only need is for AT, this distinction is important. The comments to the federal regulations indicate that to be eligible under IDEA, a student must need special education, not just related services (unless the state defines related services as special education). 34 C.F.R. § 300.7(a)(2). Because AT may be special education, the student needing only AT will meet this standard.

their own standards for ESY services as long as the standard does not deny ESY services to children who need them to receive a FAPE. Federal Register, p. 12576, 3/1/299.

In most cases, it will be appropriate to look at a variety of factors "(e.g., likelihood of regression, slow recoupment, and predictive data based on the opinions of professionals)", "but for some children, it may be appropriate to make the determination of whether the child is eligible for ESY services based only on one criterion or factor." *Id.* In any event, to receive AT during the summer, a student need not be in a full-day educational program. A single special education service (including AT) may be provided during the summer as the sole component of a summer program. *See OSEP Policy Letter to Hon. T. Libous*, 17 EHLR 419 (11/15/90).

2. Evaluations

As with any other component of a student's program, providing appropriate AT begins with a good, comprehensive assessment. The IEP Team must assess "the student's functional capabilities and whether they may be increased, maintained, or improved through the use of [AT] devices or services." *OSEP Policy Letter to J. Fisher*, 23 IDELR 565 (12/4/95). Hearing, vision, communication and motor abilities are properly included in the school's AT assessment. *OSEP Policy Letter to T. Bachus*, 22 IDELR 629 (1/13/95).

A parent has the right to an independent AT evaluation, at school expense, if the parent disagrees with the evaluation obtained by the school, and the school fails to show that its evaluations were appropriate. *OSEP Policy Letter to J. Fisher*, 23 IDELR 565 (12/4/95).

3. Examples of AT

There is no federal "approved list" of AT devices and services covered by IDEA. *OSEP Policy Letter to D. Naon*, 22 IDELR 888 (1/26/95). AT can be quite simple and inexpensive, such as a calculator, *OSEP Policy Letter to C. Lambert*, 18 IDELR 1039 (4/24/92), large print books, or adapted spoons. *OSEP Policy Letter to Hon. W. Teague*, 20 IDELR 1462 (2/15/94). It can include more sophisticated devices, such as an auditory FM trainer for a student who is hearing impaired, *OSEP Policy Letter to Anonymous*, 18 IDELR 1037 (4/6/92), a personal computer, *OSEP Policy Letter to Anonymous*, 29 IDELR 1089 (11/6/97), or a closed circuit TV for a student who is blind. *OSEP Policy Letter to Anonymous*, 18 IDELR 627 (11/21/91). As noted above, IDEA '97 also includes O&M services. *See also OSEP Policy Letter to Anonymous*, 13 EHLR 213:198 (2/13/89).

The comments to the new regulations indicate that it is not appropriate to give examples of covered AT devices in the regulations. However, the comments note that captioning, computer software, FM systems and hearing aids are appropriate AT devices for students with hearing impairments. The comments also note other examples of AT devices include electronic notetakers, cassette recorders, word prediction software, adapted keyboards, voice recognition and synthesis software, head pointers, and enlarged print. Federal Register, pp. 12540, 12575, 3/12/99.

4. Least Restrictive Environment and AT

The legislative history adding AT to IDEA, referred to above, also stresses how AT can assist a student to be educated in the LRE. To ensure meaningful integration with nondisabled peers, a federal court has ruled that a child who could not regulate his body temperature was entitled to a fully air-conditioned classroom, not an air-conditioned plexiglass cubicle where he would be isolated from his peers. *Espino v. Besteiro*, 520 F.Supp. 905 (S.D.Tex. 1981).

As noted above, the use of O&M services and travel training, which can include AT, should be designed to promote more independent travel within the school, home and community. 34 C.F.R. § 300.24(b)(4) and (6). The comments to the new regulations also indicate that AT may allow a student in a wheelchair, for example, to be transported on a regular bus. *Id.* Part 300, App. A, Quest. 33.

5. Implementation

The comments to the new regulations, noting that each student's need for AT must be made on an individual basis, indicate that:

> [D]eterminations regarding the provision of AT must be made when the child's IEP for the upcoming school year is finalized so that the AT can be implemented with the IEP at the beginning of the next school year. Federal Register, p. 12591, 3/12/99 (emphasis added)

To support implementation of AT goals, the definition of AT services includes training for the student with a disability, as well as the family, if appropriate. 34 C.F.R. § 300.6(e). The new regulations strengthen this concept by adding to the definition of "parent counseling and training." The definition now includes "[h]elping parents to acquire the necessary skills that will enable them to support implementation of their child's IEP." *Id.* § 300.24(b)(7)(iii). The comments note that this change is consistent with "the more active role acknowledged for parents" by IDEA '97. Federal Register, p. 12549, 3/12/99. It is hoped that teaching parents the skills to help their children reach their IEP goals will:

> [A]ssist in furthering the education of their children, and will aid the schools as it will create opportunities to build reinforcing relationships between each child's educational program and out-of-school learning. *Id.*

A federal court has recently determined that a school did not provide appropriate AT to a student with multiple disabilities. It was agreed that the student needed a laptop computer with a word prediction program. The court found, however, that the school did not properly implement this recommendation. *East Penn School District v. Scott B.*, 29 IDELR 1058 (E.D.Pa. 1999).

To support its conclusion, the court found that the school: (1) took a year to obtain the

computer and an additional semester to get the computer up and running; (2) took another semester before the teacher and some of the other staff were trained; (3) never trained the aide or the parents; (4) inadequately adapted the keyboarding instruction to the student's physical needs; (5) did not design the use of the AT device so it would permeate the student's day; and (6) chose a software program that would not provide meaningful educational benefit to the student. *Id.*

C. Special Issues

1. Home Use

What if a student using AT needs the device at home? Say a high school student with a learning disability uses a computer to do written work. Can the student take the computer home (if it is a laptop) or ask the school to provide a computer or software for home use? The U.S. Department of Education has stated that if the IEP Team determines that an AT device is needed for home use for a student to receive a FAPE, the technology must be provided. The example given by the Department of Education was a closed-circuit TV for a student who is blind and needed to use the device at home to complete homework assignments. *OSEP Policy Letter to Anonymous*, 18 IDELR 627 (11/21/91). The new regulations state that schools may be responsible for providing AT in the home, or in other settings, if the IEP Team determines, on a case-by-case basis, that the student will need the AT in that setting to receive a FAPE. 34 C.F.R. § 300.308(b).

2. Personally Prescribed Devices

Historically, the U.S. Department of Education has ruled that schools are not required to provide a personal device which a student would require whether or not in school. However, because the definition of AT device does not include this limitation, the Department of Education has changed its position. It has stated that a hearing aid is covered under the definition of "AT device." Therefore, if the child requires a hearing aid in order to receive a FAPE, the school must provide it at no cost to the child or parents. *OSEP Policy Letter to P. Seiler*, 20 IDELR 1216 (11/19/93); *OSEP Policy Letter to J. Galloway*, 22 IDELR 373 (12/22/94). Similarly, if a student requires eyeglasses in order to receive a FAPE, the school must provide the eyeglasses at no cost to the parents. *OSEP Policy Letter to T. Bachus*, 22 IDELR 629 (1/13/95). The same analysis would apply to a pulmonary nebulizer. *See OSEP Policy Letter to Anonymous*, 24 IDELR 388 (1/23/96). The comments to the new regulations confirm this position. Federal Register, p. 12540, 3/12/99.

The definition of related services includes transportation in and around school buildings and can involve specialized equipment. 34 C.F.R. § 300.24(b)(15). Based on this definition, the Department of Education has issued an opinion that if a wheelchair is required, the school must provide the service at public expense and without charge, regardless of whether the parents possess a wheelchair or can obtain one through private insurance. However, the school is not required to provide the wheelchair for personal use while the student is not in school. *OSEP Policy Letter to J. Stohrer*, 13 EHLR 213:211, 212 (4/20/89).

3. Private Insurance and Medicaid

IDEA '97 specifically authorizes the use of Medicaid. The regulations also authorize the use of a parent's private insurance. 34 C.F.R. § 300.301(b). May a school compel a parent to use Medicaid or private insurance when it is available to the family? The U.S. Department of Education has stated that this use must be voluntary. A school cannot deny services if parents refuse to authorize the use of Medicaid or private insurance. Moreover, such use must not result in any cost to the parents, such as: copayment, deductible, or reduction of an annual or lifetime cap on coverage. *OSERS Policy Letter to Rose*, 18 IDELR 531 (4/19/91).

The school can eliminate the possibility of cost to the parents by paying for the deductible or copayment. Nevertheless, there may be circumstances where parents will still not want to use the private insurance policy, or Medicaid. For some students with significant needs, even a very substantial lifetime cap could be quickly used up, requiring the family to be very careful about when the insurance policy is used. Both Medicaid and private insurance companies may limit how frequently they will pay for an item. Therefore, a parent's use of insurance or Medicaid to pay for special education and related services is voluntary. If the parent refuses to consent to their use, special education services cannot be denied. *OSEP Policy Letter to Dr. O. Spann*, 20 IDELR 627 (9/10/93); *OSEP Policy Letter to W. Cohen*, 19 IDELR 278 (7/9/92).

The regulations codify these principles. A school may use parents' private insurance only with the parents' informed consent, each time the school seeks to use their insurance. The school must tell parents that their refusal to consent to the use of their private insurance does not relieve the school of its obligation to provide services. 34 C.F.R. § 300.142(f). The comments add that parents may not be aware of potential future consequences resulting from the use of their insurance. Accordingly, schools should inform parents of potential consequences, such as exceeding a cap on benefits, and encourage parents to check with their insurance provider before giving consent. Federal Register, p. 12567, 3/12/99.

Unlike private insurance, a school is not required by IDEA to obtain advance consent each time it uses a public insurance program, such as Medicaid. *Id.*, p. 12569. But, a school may not require parents to sign up for public insurance. Nor can the school require the parents to use public insurance where there is "financial cost." Financial cost includes: (1) out-of-pocket expenses such as deductibles or copayments; (2) a decease in available lifetime coverage or any other benefit, including the family paying for services that would otherwise have been covered; (3) risk of loss of eligibility for home and community-based waiver programs; and (4) an increase in premiums or the discontinuation of the insurance. 34 C.F.R. § 300.142(e).

A school may pay the costs of accessing the private or public insurance for parents who would otherwise have consented to the use of the insurance. *Id.* § 300.142(g)(2). However, as with private insurance, a child's right to a FAPE is not dependent upon whether parents consent to the use of public insurance, such as Medicaid. Federal Register, p. 12569, 3/12/99. If the parents refuse to give consent to using Medicaid, the school is still responsible for providing the recommended services.

4. Repairs and Damages

The definition of AT services includes repairing, maintaining and replacing AT devices. 20 U.S.C. § 1401(2); 34 C.F.R. § 300.6(c). Therefore, if an AT device is damaged during the course of its use, the school should be responsible for any repairs. Accordingly, the U.S. Department of Education has stated that if parents agree to use family-owned AT to fulfill the IEP, the school is responsible for maintenance and repair if it was damaged on the school bus or at school. The Department of Education reasoned that if the school did not use the family-owned device, it would be responsible for providing and maintaining a needed device itself. *OSEP Policy Letter to Anonymous*, 21 IDELR 1057 (8/9/94).

Nevertheless, the Department of Education made the following observations in a policy letter on repairs and maintenance of AT devices: If the IEP Team determines that a student needs an AT device at home to receive a FAPE, the device must be provided at no cost to the parents. This means a school cannot charge parents for normal use and wear and tear. However, state laws govern "whether parents are liable for loss, theft, or damage due to negligence or misuse of publicly-owned equipment used at home in accordance with a student's IEP." *OSEP Policy Letter to S. Culbreath*, 25 IDELR 1212 (2/7/97). This policy letter does not discuss how the definition of AT service, which includes maintenance and repair, applies. It did, however, note that any state laws must still be implemented consistently with IDEA and the right to a FAPE. *Id.* The comments to the new regulations restate this proposition: that parents cannot be charged for normal use, and wear and tear, but that state law, not IDEA, will generally govern parent liability for theft, loss, or damage due to negligence or misuse of AT at home or in other settings. Federal Register, p. 12540, 3/12/99.

D. AT Used with School Health Services

IDEA allows for the provision of "medical services," but they are limited to diagnosis and evaluation. 20 U.S.C. § 1401(22). The regulations define "medical services" as those "provided by a licensed physician to determine a child's medically related disability." 34 C.F.R. § 300.24(b)(4). The regulations also include "school health services," which are to be provided by "a qualified school nurse or other qualified person." *Id.* § 300.24(b)(12). Therefore, according to the regulations, the services a physician is authorized to perform are limited to evaluations and diagnoses. Direct medical types of services by non-physicians, such as nurses and trained laypersons are permitted.

1. The *Tatro* Decision

This regulatory scheme was upheld by the Supreme Court in *Irving Independent Sch. Dist. v. Tatro*, 468 U.S. 883 (1984). Amber Tatro was, at the time of the decision, an eight year old with spina bifida. As a result, she needed to be catheterized every three to four hours. Clean intermittent catheterization (CIC) is a simple procedure that can be performed by a layperson with less than an hour's training. It was expected that Amber would soon be able to perform the procedure herself. The school, nevertheless, refused to provide this service to her.

The Court ruled that CIC is a permissible related service for students with disabilities. The Court reasoned that catheterization is a related service because it "enables a handicapped child to remain at school during the day . . . [similar to] services that enabled the child to reach, enter or exit the school." *Id.* at 891. In determining whether a medically related service is permissible as a "school health service" or excluded as a "medical service," the Court stated that the service must be required to be performed during the school day and must be able to be performed by someone other than a physician. *Id.* at 894.

The Court rejected the school's concern about increased liability if it performed this service as not relevant to whether CIC is a related service. The Court went on to note that:

> [IDEA] creates numerous new possibilities for injury and liability. ... Congress assumed that states receiving the generous grants under the Act were up to the job of managing these new risks. Whether [the school] decides to purchase more liability insurance or to persuade the State to extend the limitation on liability, the risks posed by CIC should not prove to be a large burden. *Id.* at p 893, fn. 12.

Based on *dicta* in *Tatro*, several courts had adopted a multi-factor test to determine whether IDEA required a school to provide health services to students. *See Neely v. Rutherford County School*, 68 F.3d 965 (6th Cir. 1995), *cert. denied*, 517 U.S. 1134 (1996); *Detsel v. Bd. Of Ed. Of Auburn Enlarged City School Dist.*, 820 F.2d 587 (2nd Cir. 1987), *cert. denied*, 484 U.S. 981 (1987).

2. The *Garret F.* Decision

On March 3, 1999, the Supreme Court reaffirmed its decision in *Tatro*. The Court adopted a "bright line" test for determining whether health services are required under IDEA and ordered a school district to provide a ventilator-dependent student with one-to-one school health services. It rejected a multi-factor test to determine the need for school health services. *Cedar Rapids Community Sch. Dist. v. Garret F.*, ___ U.S. ___, 119 S.Ct. 992 (1999).

Garret is described as a "friendly, creative, intelligent young man" who is successfully attending regular education classes. *Id.* at 995. He is paralyzed from the neck down because of a motorcycle accident when he was four years old. He operates his motorized wheelchair through a puff and suck straw and operates a computer with a device that responds to head movements. He is ventilator dependent for breathing and requires additional assistance for several health care needs during the school day. Garret needs someone to assist with CIC, suctioning his tracheotomy tube, food and drink at lunch, getting him into a reclining position for five minutes every hour and manually pumping an air bag for him to breath while his electric ventilator is being maintained. *Id.* and fn. 3. Garret's needs were attended to by an 18 year old aunt for one year and then by a licensed practical nurse which the parents hired with proceeds from the accident settlement. When the family asked the school to begin paying for this service, it refused, stating it was not required to provide continuous one-on-one nursing care. *Id.* at 995-996.

In *Garret F.*, the school urged the adoption of a multi-factor test that would look at whether the care was continuous or intermittent, whether existing school health personnel could provide the service, the cost of the service, and the potential risk if the service was not performed properly. *Id.* at 998. The Supreme Court, noting that all of the school's factors really boil down to cost, rejected them as a basis for determining whether a student needs health related services. The Court stated the school's multi-factor test "is not supported by any recognized source of legal authority." *Id.* Moreover, while more extensive than the services at issue in *Tatro*, Garret's needs were no more "medical." *Id.*

The Court reaffirmed the use of its two-part test developed in *Tatro* and referred to above (i.e., whether the service must be performed during the school day and will be provided by a non-physician). It was conceded that Garret required the requested services, during the school day, to be able to attend school and that the services did not need to be performed by a physician. Therefore, the Court affirmed the responsibility of the school to provide the services.

Finally, in a comment that can be extended beyond the issues involved in Garret's case, the Court noted that schools "cannot limit educational access simply by pointing to the limitations of existing staff." "[T]he IDEA requires school districts to hire specially trained personnel to meet disabled student needs." *Id.* at p. 999, fn.8 (citations omitted).

IDEA requires that states have what is referred to as a comprehensive system of personnel development to ensure there are sufficient qualified personnel to meet the needs of its students with disabilities. 34 C.F.R. § 300.135. In keeping with the theme raised in *Garret F.*, the comments to the new regulations note that "each State must have a mechanism for serving children with disabilities if instructional needs exceed available (qualified) personnel, including addressing those shortages in its comprehensive system of personnel development if the shortages continue." Federal Register, p. 12408, 3/12/99, regarding 34 C.F.R. § 300.136(g)(3).

IV. MAXIMIZATION OF A STUDENT'S POTENTIAL

As with any other specialized services a student with a disability will receive under IDEA, the basic question will always be: is this AT device or service necessary to enable the student to receive a FAPE? Therefore, the definition of appropriate is critical in determining the availability of AT. What, if any, arguments can be made to limit the impact of the *Rowley* case when looking at the AT needs of a student?

A. The *Rowley* Decision

As stated above, in 1982 the United States Supreme Court determined that the obligation to provide a FAPE did not mean a school was required to "maximize" a student's potential or provide the best education possible. The Court noted that the program must be based on the student's unique individual needs and be designed to enable the student to benefit from an education. In other words, the student must be making progress. *Rowley*, 458 U.S. 176 at 188, 189. However, more than a

minimal benefit is required for the program to be appropriate. *Polk v. Central Susquehanna Intermediate Unit*, 853 F.2d 171 (3rd Cir. 1988), *cert. denied*, 109 S. Ct. 838 (1989); *See Ridgewood Board of Ed. v. N.E.*, 30 IDELR 41 (3rd Cir. 1999).

In the case of a student being educated in regular classes, the Court determined that in most cases, if the student was advancing from grade to grade with the benefit of supportive services, the student was receiving an appropriate education. *Rowley* at 203. The Court cautioned, however, that not "every child who is advancing from grade to grade in a regular public school system is automatically receiving a [FAPE]." *Rowley* at p. 203, fn. 25 (emphasis added). Consistent with this comment, the new regulations make clear that schools are not relieved of their obligation to provide a FAPE to students even though they are advancing from grade to grade. The decision of whether a student is still in need of services is to be made by the IEP Team. 34 C.F.R. § 300.121(e).

Accordingly, one court has found that a student with an orthopedic impairment, who desired transition services to assist her move from high school to independent living at college, was still eligible for services even though she was an "A" student. *Yankton School Dist. v. Schramm*, 93 F.3d 1369 (8th Cir. 1996). The court stressed that the student received shortened and modified writing assignments, instruction on how to type, copies of class notes, related services to address her slowness in walking and hand strength, special transportation to school on a lift bus and mobility assistance within the school building. *Id.* at 1374. In reaching its conclusion, the court noted that all of these services were necessary because of her impairment and that but for this specialized instruction and services, her educational performance would be adversely affected. *Id.* at 1375.

B. LRE and Uses of AT

IDEA requires that students are educated in the least restrictive environment (LRE) to the "maximum" extent appropriate. Here, we are looking at maximizing something – the placement of a student in the regular education environment. Accordingly, the *Rowley* test for determining whether a program is appropriate is not particularly helpful when LRE is at issue. *See Daniel R.R.*, 874 F.2d 1036 at 1045 ("The *Rowley* test thus assumes the answer to the question presented in a mainstreaming case.").

This is even more true when the issue is LRE combined with AT. The legislative history adding AT to IDEA emphatically recognized the role AT might play in implementing the LRE requirement: AT "will redefine an 'appropriate placement in the least restrictive environment' and allow greater independence and productivity." House Report No. 101-544, 1990 U.S. Code Cong. & Admin. News, p. 1730. In LRE cases, therefore, the question to be answered is, again, not the degree of academic progress being made, but the need for the AT for the student to be successful in the regular education setting. Recall that in *Espino v. Besteiro*, 520 F.Supp. 905 (S.D.Tex. 1981) the court ordered the school to provide an air conditioned classroom for a student to enable him to interact with his peers in the classroom.

C. Students in Transition

Transition planning requirements were first added to IDEA in 1990. Transition services were defined as a coordinated set of activities, designed within an outcome oriented process, which promotes movement from school to adult living. 20 U.S.C. § 1401(30). Transition services were to begin no later than age 16. *Id.* § 1414(d)(1)(A)(vii)(II).

Therefore, since 1990, when considering transition services for students, the question to be answered should not have been limited solely to issues of academic progress when considering whether a student is receiving an appropriate education. Rather, the issue should have been what will the goal be for this student as an adult, where is the student now in reaching that goal, and what will the student need between now and when the student completes high school or ages out to be ready to meet that goal. That is what an "outcome oriented approach" means.

Of greater significance is the change to transition planning requirements made by IDEA '97. Now, beginning at age 14, schools are to begin considering the transition needs related to a student's course of study such as "participation in advanced placement courses or a vocational education program." *Id.* § 1414(d)(1)(A)(vii)(I)(emphasis added).

In Amy Rowley's case, Amy was advancing from grade to grade even though she was missing about half of what was being said in her classes. *Rowley*, 458 U.S. at 184-85. How would she have faired in an advanced placement (AP) class if she missed half of what was occurring? What if she needed the sign language interpreter or real time captioning to pass AP History? Since transition planning now includes, where applicable, AP courses, if she did need one those services to pass the class, she should be entitled to it.

D. Effect of IDEA '97

When passing IDEA '97, Congress did not specifically modify the definition of FAPE itself. *See* 20 U.S.C. § 1401(8). However, Congress did make some profound statements which seem to undercut the Supreme Court's analysis in *Rowley*. First, in its statement of findings, Congress found that the education of students with disabilities can be made more effective by supporting professional development of those working with them to ensure that students with disabilities

> [H]ave the skills and knowledge necessary to enable them--
>
> (i) [T]o meet developmental goals and, to the maximum extent possible, those challenging expectations that have been established for all children, and
>
> (ii) [T]o be prepared to lead productive, independent, adult lives, to the maximum extent possible .... *Id.* § 1400(c)(5)(E)(emphasis added).

More importantly, in delineating the purposes of IDEA, Congress also enlarged the scope of

an appropriate education by requiring that not only should it meet students' unique needs, it should also "prepare them for employment and independent living." *Id.* § 1400(d)(1)(A). This addition is more than mere window dressing, as states must develop goals for the performance of children with disabilities which will promote meeting this requirement. *Id.* § 1412(a)(16)(A)(i).

The U.S. Department of Education, in the commentary to its proposed regulations implementing IDEA '97, stressed:

> This change represents a significant shift in the emphasis of [IDEA]–to an outcome oriented approach that focuses on better results for children with disabilities rather than on simply ensuring their access to education. Federal Register, p. 55029, 10/22/97 (emphasis added).

The comments to the final regulations reaffirm this position:

> Therefore, it is correct to state that the 1997 amendments [to IDEA] place greater emphasis on a results-oriented approach related to improving educational results for disabled children than was true under prior law. Federal Register, p. 12538, 3/12/99.

Nevertheless, because the phrase "appropriate" is still used in the definition, it is unlikely that these comments mean that *Rowley* has been effectively overruled by Congress in all circumstances. However, in determining whether a student is benefitting from an education, the analysis cannot be limited solely to academic achievement. Even if a student is making significant academic progress, that can no longer be the end of the inquiry.

By adding that the purpose of IDEA is to prepare students for employment and independent living, Congress simply took what already applied to students during the transition years and applied it to students of all ages. IDEA '97 expands the question of what the purpose of an education is. Therefore, if a student will need AT to prepare for adult living, even if he or she is making academic progress, the AT should be provided.

V. EDUCATIONAL METHODOLOGY

A. Implications of the *Rowley* Decision

In *Rowley*, the Supreme Court also stated that courts should not substitute their judgement about particular types of educational methodology for that of education officials. The Court commented that IDEA was "by no means an invitation to the courts to substitute their own notions of sound educational policy for those of the school authorities which they review." *Rowley*, 458 U.S. at 206. Over the years many courts have, based on this language, deferred to the judgement of the educators when reviewing choices of educational method.

Nevertheless, schools must still ensure that the IEP is appropriate for the student. *Rowley* at

207. The warning not to second guess a school's choice of educational methodology does not mean that the court should ignore its obligation to enforce IDEA. *Oberti v. Board of Education*, 995 F.2d 1204, 1214 (3rd Cir. 1993). Moreover, there is nothing to prohibit including an instructional method on the IEP. *See Ridgewood Bd. Of Ed. v. N.E.*, 30 IDELR 41 (3rd Cir. 1999)(IEPs included Orton Gillingham and Wilson reading methods).

B. IDEA '97

The regulations implementing IDEA '97 amend the definition of special education to include a definition of "specially-designed instruction." Specially-designed instruction includes adapting "methodology or delivery of instruction" to meet the unique needs of a student with a disability and to ensure access to the general curriculum. 34 C.F.R. § 300.26(b)(3)(emphasis added). The comments to the regulations note concerns raised in the legislative history to IDEA '97, that IEPs should not be overly-prescriptive by including a day-to-day teaching approach or lesson plan. Federal Register, p. 12552, 3/12/99. They also note that while case law has recognized the important role instructional methodology can play in providing a FAPE, courts "will not substitute a parentally preferred methodology for sound educational programs developed by" the school. *Id.*

In discussing the importance of adding "methodology" to the definition of specially-designed instruction, however, the comments note:

> [T]here are circumstances in which the particular teaching methodology that will be used is an integral part of what is "individualized" about a student's education and, in those circumstances will need to be discussed at the IEP meeting and incorporated into the student's IEP. For example, for a child with a learning disability who has not learned to read using traditional instructional methods, an appropriate education may require some other instructional strategy. ... There is nothing in the definition of "specially designed instruction" that would require instructional methodology to be addressed in the IEPs of students who do not need a particular instructional methodology in order to receive educational benefit. In all cases, whether methodology would be addressed in an IEP would be an IEP team decision. *Id.*

C. *Rowley* Revisited

The discussion of educational methodology in the *Rowley* case arose in the context of the appropriate method for teaching a student who was deaf. *Rowley*, 458 U.S. at 207, fn. 29. At issue in the case was whether Amy Rowley needed a full-time sign language interpreter. As noted above, IDEA '97 now requires that the IEP Team consider the use of Braille for blind and visually impaired students and the use of and instruction in the child's language and mode of communication for deaf or hard of hearing students. 20 U.S.C. § 1414(d)(3)(B), 34 C.F.R. § 300.346(a)(2).

The comments to the new regulations make it clear that this requirement effectively overrules the *Rowley* decision. They note that if the IEP Team determines that a student who is deaf needs a

sign language interpreter in order to participate in the general curriculum, those needs must be addressed in the IEP. *Id.* Part 300, App. A, Quest. 2. The comments go on to add that if the student needs to expand his or her vocabulary in sign language, that need must be addressed, and that the IEP Team may want to consider training family members in sign language, if needed for the student to receive a FAPE. *Id.*

D. Methodology and AT

IDEA defines AT devices and services as either special education, related services or supplementary aids and services. 34 C.F.R. § 300.308(a). As noted above, IDEA '97 requires that the IEP include the special education, related services and supplementary aids and services the student will receive. 20 U.S.C. § 1414(d)(1)(A)(iii). Accordingly, as with any other special services a student may receive, the IEP must include a specific statement describing such service, including the nature and amount of such services. *OSEP Policy Letter to* Anonymous, 29 IDELR 1089 (1/6/97).

What about a student's need for computer software? Will the choice of software be akin to educational methodology and be limited by the *Rowley* decision? As noted above, the AT definitions under IDEA were taken from the Tech Act. The legislative history to the Tech Act noted that computer software is included in the definition of an AT device. Senate Report No. 100-438, 1988 U.S. Code Cong. & Admin. News, p. 1405. As noted above, the comments to the new regulations also include computer software in the examples of AT devices. Federal Register, pp. 12540, 12575, 3/12/99. Therefore, computer software would also be included in the definition of an AT device under IDEA, to be included in the IEP as would any other AT device or service.

This is not to say that schools have no discretion in selecting a particular brand of AT hardware or software. However, the AT selected by the school must be appropriate to the needs of the student, and the parents are entitled to pursue an impartial hearing to appeal the school's choice. For example, in *East Penn School District v. Scott B.*, 29 IDELR 1058 (E.D.Pa. 1999), it was agreed that the student needed a laptop computer with a word prediction program. The school selected a word prediction program called Telepathic. The parents appealed and the court found that this program was not appropriate because it would not provide meaningful educational benefit to the student. The court found that the student needed a program which would also provide word recognition and grammar prediction, such as Co Writer.

VI. OBLIGATIONS OF SCHOOL DISTRICTS UNDER SECTION 504

A. Introduction

Section 504 was included in the Rehabilitation Act of 1973. The major thrust of the Rehabilitation Act of 1973 was to provide federal funding and a mandate for vocational rehabilitation services for people with disabilities. Section 504, however, which prohibits discrimination on the basis of disability, was modeled after the Civil Rights Act of 1964. It is codified at 29 U.S.C. § 794, but because it is so often referred to simply as section 504, that is what it will be called in this booklet.

The section 504 regulations which cover schools are found at 34 C.F.R. Part 104. Section 504 also served as the foundation for the Americans with Disabilities Act (ADA). 42 U.S.C. §§ 12101 *et seq.* However, because the ADA does not provide any rights to students with disabilities beyond what are included in section 504, this booklet will not discuss the ADA.

Section 504 is a very broad statute. It prohibits discrimination in any program or activity receiving federal financial assistance. It also applies to any programs run by the U.S. government. The relevant part of the law is:

> No otherwise qualified individual with a disability in the United States, as defined in section 706(8) of this title, shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by [the U.S. government]. 29 U.S.C. § 794(a).

Since, as far as we know, all public school districts receive federal funds, they are covered by section 504. Additionally, any private schools which receive federal funds, including those run by religious organizations, are also covered, even if they receive the money indirectly. 34 C.F.R. § 104.3(f). Many private schools may receive federal funds from the local school district in which they are located in the form of textbook aid, or aid for school breakfast or lunch and, therefore, are covered by section 504. However, there is no separate funding available under section 504 to assist schools in meeting their responsibilities under section 504. By receiving federal money for other programs, such as IDEA, they are required to comply with section 504.

To be eligible for services under IDEA, a student's disability must meet the definition of one of several listed disabilities and, as a result, the student must require special education services. 20 U.S.C. § 1401(3)(A). The definition of disability under section 504 is much broader. The statute defines an "individual with a disability" as:

> [A]ny person who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment. 29 U.S.C. § 706(8)(b).

Additionally, under section 504, students with disabilities are eligible even if they do not need any special education services. A student would be eligible if the only services received were modifications in the regular education program. *See* 34 C.F.R. § 104.33(b)(1).

Therefore, students whose disabilities do not meet the criteria under IDEA, but who still may need some specialized assistance, including AT, are covered by section 504. *U.S. Dept. of Ed., Joint Policy Memorandum*, 18 IDELR 116 (9/16/91); *OSEP Policy Letter to Teague*, 20 IDELR 1462 (2/15/94). Furthermore, if a school determines that a student with a disability is not eligible for services under IDEA, it must have a process in place to determine whether the student is covered by section 504. *See U.S. Dep't of Ed., Joint Policy Memorandum*, 18 IDELR 116 (9/16/91).

In *Southeastern Community College v. Davis*, 442 U.S. 397 (1979), the Supreme Court ruled that section 504's prohibition on discrimination was not a mandate for affirmative action. Accordingly, section 504 does not require a recipient to undertake substantial revision of its program. The Court left open, however, the possibility that in certain circumstances a recipient of federal funds could be required to take affirmative steps to avoid discriminatory treatment. Affirmative steps would be required if those steps did not impose undue financial and administrative burdens. *Id.* at 412. *See New Mexico ARC v. New Mexico*, 678 F.2d 847 (10th Cir. 1982).

In keeping with the basic tenor of section 504, to prevent discrimination, schools must take all reasonable steps to ensure that students with disabilities have access to the full range of programs and activities offered by the school. 34 C.F.R. §§ 104.4, 104.21, 104.22, 104.34, 104.37. *See Eldon (MO) R-I School District*, EHLR 352:145 (OCR, 1/16/86); *Beaver Dam (WI) Unified Sch. Dist.*, 26 IDELR 761 (OCR, 2/27/97)(Access to chorus room and auditorium); *Saddleback Valley (CA) Unified Sch. Dist.*, 27 IDELR 376 (OCR, 5/5/97). A school district is not required to make every part of every building it owns fully accessible. However, it is responsible for ensuring that all of its programs are accessible to students with disabilities. 34 C.F.R. § 104.21. In meeting this program accessibility mandate, a school does not need to make structural changes to existing facilities if other effective methods are available. However, the school must give priority to those methods which enable students with disabilities to participate "in the most integrated setting appropriate." *Id.* § 104.22(b).

B. Free Appropriate Public Education

As with IDEA, section 504 guarantees that students with disabilities receive a FAPE. However, section 504 defines FAPE a little differently. Under section 504, it is defined as regular or special education and related aids and services that are designed to meet individual educational needs of students with disabilities as adequately as the needs of nondisabled students are met. *Id.* § 104.33(b)(1). All services are to be without cost to the students or their parents, except for those fees that are imposed on nondisabled students or their parents. *Id.* § 104.33(c)(1).

OSEP, in a policy memorandum about attention deficit disorders (ADD), indicated that the following services are available under section 504. *U.S. Dept. of Ed., Joint Policy Memorandum*, 18 IDELR 116 at 118 (9/16/91).[6]

> State educational agencies and [schools] should take the necessary steps to promote coordination between special and regular education programs. Steps also should be taken to train regular education teachers and other personnel to develop their awareness about ADD and its manifestations and the adaptations that can be

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[6] Note that all students with disabilities being educated under IDEA are also covered by section 504, so these comments would apply to students classified under IDEA as well. Also, although the policy memo is explicitly discussing students with ADD, there is no reason that these services could not be made available, as appropriate, to a student with any other disability.

implemented in regular education programs to address the instructional needs of these children. Examples of adaptations in regular education programs could include the following:

a. Providing a structured learning environment

b. Repeating and simplifying instructions about in-class and homework assignments

c. Supplementing verbal instructions with visual instructions

d. Using behavioral management techniques

e. Adjusting class schedules and modifying test delivery

f. Using tape recorders, computer-aided instruction, and other audio-visual equipment

g. Selecting modified textbooks or workbooks

h. Tailoring homework assignments.

Other provisions range from consultation to special resources and may include reducing class size; use of one-on-one tutorials; classroom aides and note takers; involvement of a "services coordinator" to oversee implementation of special programs and services, and possible modification of nonacademic times such as lunchroom, recess and physical education.

C. Least Restrictive Environment

As with IDEA, section 504 requires that each student with a disability is to be educated with students who are not disabled, to the maximum extent appropriate. There is also a similar preference for educating students in the regular education setting. Students are to be placed in the regular educational environment unless it is demonstrated by the school that the education of the person in the regular environment with the use of supplementary aids and services cannot be achieved satisfactorily. For students placed in a setting other than the regular educational environment, the school shall take into account the proximity of the alternate setting to the person's home. 34 C.F.R. § 104.34(a).

D. Due Process and Procedural Safeguards

Schools are required to develop a procedure to determine the student's needs. Schools may choose to simply use the IEP procedures under IDEA to determine a student's needs under section

504. *Id.* §§ 104.33(b)(2), 104.36. However, because most of the services under section 504 will be provided by regular education staff within the school, many schools have set up building level teams to implement section 504. In such cases, the procedures developed must conform to section 504. Most of the requirements are similar but not identical to IDEA's requirements.

Prior to providing any services under section 504, the student must be provided with a comprehensive, individualized evaluation of his or her needs. Once the student begins receiving services, there must be regular reevaluations. There must also be a comprehensive reevaluation before any significant change in placement. *Id.* § 104.35(a), (b) and (d). Decisions about the services the student will receive must be made by a group of people, knowledgeable about the child, the evaluation information and the placement options. *Id.* § 104.35(c). The parents must be involved in the process. *See Id.* § 104.36. There is no requirement that the school develop an IEP for the student. However, the student's needs and the services to be provided must be specifically identified, in writing. *OCR Senior Staff Memorandum*, EHLR 307:01 (10/24/88).

Parents have due process rights if they disagree with the school's recommendations under section 504, including the right to an impartial hearing and a review procedure. The school may use the due process procedures under IDEA to satisfy the section 504 mandates, but is not required to do so. 34 C.F.R. § 104.36. The due process rights under section 504 do not include the right to an independent evaluation at school expense. However, the U.S. Department of Education's Office for Civil Rights (OCR), which enforces section 504, has determined that an impartial hearing process must include "status quo," i.e., the right to continued services pending an appeal. *OCR Policy Letter to P. Zirkel*, 22 IDELR 667 (5/15/95).

E. Assistive Technology

If a student with a disability, who is not receiving special education services, needs an AT device to fully participate in school activities, section 504 may require that the school provide the device, as well as any training needed to effectively use the device. *U.S. Dept. of Ed., Joint Policy Memorandum*, 18 IDELR 116 at 118 (9/16/91); *Colton Joint (CA) Unified Sch. Dist.*, (OCR, 4/7/95). Because services under section 504 are to be free, the school should, as under IDEA, be responsible for repairs and maintenance.

Over the years, OCR has issued a number of rulings concerning the use of AT. In a number of these cases OCR found that there was no violation of section 504 because the school was providing the AT device in question. For example, OCR recently determined that there was no violation of section 504 where the school purchased a MacIntosh computer for the student to use while in school. The student could use his IBM compatible computer at home for homework, store the work on disk, bring the disk in and have the work converted to MacIntosh format at school. *Glendale (AZ) High Sch. Dist.*, 30 IDELR 624 (OCR 1998). The following cases serve as an illustrative list of AT devices which could be funded by schools under section 504:

1. Modification and adaptation of a computer to enable a student with

quadriplegia to use the computer without assistance. *Colton Joint (CA) Unified Sch. Dist.*, (OCR, 4/7/95).

2. Classroom hearing assistive device and reduction of noise levels for a student with a hearing impairment. *Cobb County (GA) Sch. Dist.*, 27 IDELR 229 (OCR, 5/22/97).

3. Use of a computer for a student with a mobility impairment to access the library. However, the school was not required to install an elevator to make the library accessible. *Newton (MA) Pub. Schs.*, 27 IDELR 233 (OCR, 5/30/97).

4. Use of a closed caption decoder for a student with a hearing impairment while viewing videotapes. *Chapel Hill-Carrboro (NC) City Schs.*, 27 IDELR 606 (OCR, 1997).

5. Use of tutorial software and a laptop computer for a student with narcolepsy. *Bacon County (GA) Sch. Dist.*, 29 IDELR 78 (OCR, 3/13/98).

6. Use of an Arkenstone scanner to scan and read text for a learning disabled student. However, OCR determined that there was no violation of section 504 when the student was not allowed to use the device for a State reading exam. *Alabama Dept. of Educ.*, 29 IDELR 249 (OCR, 4/10/98).

VII. SYSTEMIC ENFORCEMENT OF RIGHTS UNDER IDEA AND SECTION 504

Anyone who has been a special education advocate for long is likely to encounter issues which go beyond the needs of the individual student. Whether it is a school policy which applies to all students or a lack of resources which is affecting a large number of students, the use of an impartial hearing for one student is not likely to resolve the larger issue. Are there less adversarial or more efficient ways to address these concerns?

A. Complaint to the Office for Civil Rights

As noted above, the U.S. Department of Education's Office for Civil Rights (OCR) enforces section 504. Complaints may be filed concerning individual students or groups of students. However, OCR will not investigate cases which question the decision of the Section 504 Team on such matters as the accommodations or services to be provided. Those cases will need to go through the impartial hearing process. *See Beverly (MA) Pub. Schs.*, 29 IDELR 981 (OCR 1998), *Glendale (AZ) High Sch. Dist.*, 30 IDELR 62 (OCR 1998).

OCR will accept cases alleging procedural violations, lack of accessibility, failure to provide agreed upon services and claims of discriminatory treatment. Additionally, because all students

classified under IDEA are also covered by section 504, a failure to provide services identified in an IEP is also a violation of section 504, which OCR will investigate. *See OSEP Policy Letter to Anonymous*, 18 IDELR 1037 (4/6/92).

From the parents' perspective, one of the advantages of an OCR complaint is that OCR will conduct the investigation. On the other hand, as a result, the process is not in the parents' direct control. Of benefit to both parents and schools, OCR will attempt to resolve the complaint through early dispute resolution.

B. Complaint Resolution Procedure

The Complaint Resolution Procedure (CRP) is now under IDEA Part B regulations at 34 C.F.R. §§ 300.660 - 300.662. Until 1992, the process was set out in the Education Division General Administrative Regulations (EDGAR) at *Id.* §§ 76.1 - 76.902, and, therefore, was known as the EDGAR complaint process.

Each state must establish procedures for investigating and resolving complaints concerning the provision of special education services under IDEA. *Id.* § 300.660(a). An organization or individual may file a complaint. The complaint must be signed and in writing. It must include a statement that the school has violated IDEA and the facts upon which that statement is based. The complaint must be filed within one year, unless the violation is ongoing. If the complaint is requesting compensatory services, it must be filed within three years. *Id.* § 300.662.

The state educational agency must conduct an independent on-site investigation, if necessary. It must allow the complaining party the opportunity to submit additional information, and issue a written decision within 60 days. *Id.* § 300.361(a). But, there must be a procedure to allow for extensions of time in exceptional circumstances. *Id.* § 300.361(b). The CRP cannot be used for issues where there is an impartial hearing pending or an impartial hearing decision, unless the complaint concerns implementation of the decision. *Id.* § 300.361(c).

The advantage of the CRP is that if the state finds a violation of IDEA, it must not only fashion a remedy for the individual student, it must also address the future provision of services for all children in the school district. Appropriate remedies for individual students can include monetary reimbursement and compensatory services. *Id.* §§ 300.360(b) and 300.362(c). On the other hand, as with OCR complaints, the process is out of the parents' direct control.

One court has determined that the CRP was an administrative proceeding for which attorneys' fees are available under IDEA. *Upper Valley Association for Handicapped Citizens v. Blue Mountain Union School District No. 21*, 973 F. Supp. 429 (D.Vt. 1997). The court's reasoning is consistent with cases which have required the exhaustion of the EDGAR (now CRP) process before bringing a court action under IDEA for some systemic violations, if that process will be effective in resolving the issue. *See Hoeft v. Tucson Unified School Dist.*, 967 F.2d 1298 (9th Cir. 1992); *Emma C. v. Eastin*, 26 IDELR 1279 (N.D.Cal. 1997).

C. Class Action or Other Litigation

As noted in the section on due process, IDEA includes an administrative procedure to follow prior to filing a court action. Courts have consistently required that these procedures be exhausted before a court action can be filed. *Riley v. Ambach*, 668 F.2d 635 (2nd Cir. 1981); *Thomas v. East Baton Rouge Parish Sch. Bd.*, 29 IDELR 954 (M.D. La. 1998). Parents cannot by-pass the exhaustion requirements under IDEA by attempting to file a court action under section 504, or any other federal law, if the case is one which could be brought under IDEA. 20 U.S.C. § 1415(l).

However, courts have recognized that there are circumstances where exhaustion is not required under IDEA. In *Riley v. Ambach*, the court recognized that exhaustion would not be required if it would be "plainly inadequate." It gave the following examples: (1) exhaustion would cause delay which would effectively deny the relief sought; (2) the agency may not have the authority to grant effective relief; (3) the administrative body predetermined the issue; and (4) exhaustion would otherwise prove futile. *Riley* at 640-641. Courts have also held that where schools have denied access to IDEA's procedural safeguards, a separate action could be maintained under 42 U.S.C. § 19[illegible] to enforce the rights that were denied under IDEA. *See Quackenbush v. Johnson City School Dist.*, 716 F.2d 141 (2nd Cir. 1983), *cert. denied*, 465 U.S. 1071 (1984).

Courts have used these concepts in class actions. In class actions which allege that there is widespread systemic failure to comply with IDEA, particularly where there had been some attempt to at least exhaust for some students, courts have excused the failure to exhaust. *Jose P. v. Ambach*, 669 F.2d 865 (2nd Cir. 1982); *Blackman v. District of Columbia*, 28 IDELR 1053 (D.D.C. 1998).

VIII. CONCLUSION

Assistive technology offers many students with disabilities the ability to meet their potential. With the appropriate AT available, even students with very severe disabilities can often participate fully in educational activities to prepare them for employment and independent living.

The issues involving AT and students with disabilities are clearly at the "cutting edge." The AT devices being sought for students are often items that did not even exist a few years ago. And the legal requirements regarding AT have, in many cases, emerged only very recently. It is our hope that this booklet will ensure that the attorney or advocate will be well-prepared to advocate for AT under both IDEA and section 504.

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